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SHORT TITLE: [Poindexter, Dewaine]
VERSUS [Ohio] DATE DOCKETED: [06/17/88]
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Jun 17 1988		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jul 6 1988		Brief of respondent Ohio in opposition filed.
Jul 14 1988		DISTRIBUTED. September 26, 1988
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Oct 17 1988		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. [Detached opinion.]

Command: [ ]

EDITOR'S NOTE

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87-7311

IN THE

SUPREME COURT OF THE UNITED STATES

— October Term, 1987

DEWAINE POINDEXTER,

Petitioner

-vs- NO. _____

THE STATE OF OHIO,

Respondent

On Writ of Certiorari to

The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A DEATH VERDICT BY A JURY IS CONSTITUTIONALLY UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WHERE IT FOLLOWS THE FALSE STATEMENT BY THE PROSECUTOR DURING ARGUMENT AT THE PENALTY PHASE, SEEKING TO NEGATE THE EXISTENCE OF THE STATUTORY MITIGATING FACTOR OF LACK OF A SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONVICTIONS AND/OR JUVENILE DELINQUENCY ADJUDICATIONS, TO THE EFFECT THAT THE ACCUSED HAD HAD FIVE PRIOR CONTACTS WITH THE JUVENILE JUSTICE SYSTEM, WHEN IN FACT THE OFFENDER HAD ABSOLUTELY NO CONTACTS WITH THE JUVENILE JUSTICE SYSTEM.

II.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION ARE PREJUDICIALLY VIOLATED BY THE USE BY PROSECUTORS ARGUING FOR THE DEATH PENALTY IN THE PENALTY PHASE OF A CAPITAL TRIAL OF SELECTIONS OF PRIOR OPINIONS OF THIS COURT, OUT OF CONTEXT, TO PERSUADE THE SENTENCING JURY THAT THIS COURT APPROVES OF CAPITAL PUNISHMENT.

III.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE IMPOSITION OF THE DEATH SENTENCE AFTER A JURY DEATH VERDICT WHERE THE JURY IS INSTRUCTED THAT THEIR "RECOMMENDATION" IS ONLY A RECOMMENDATION AND THAT ACTUAL SENTENCE SHALL BE IMPOSED BY THE TRIAL COURT AFTER "ADDITIONAL PROCEDURES" ARE CONDUCTED.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN CALDWELL V. MISSISSIPPI.

IV.

WHETHER THE EIGHTH AMENDMENT REQUIREMENT OF RELIABILITY IN THE IMPOSITION OF THE DEATH SENTENCE REQUIRES A STATE SUPREME COURT, MANDATED CONSTITUTIONALLY TO CONSIDER APPEALS WHERE THE DEATH sentencE HAS BEEN AFFIRMED, TO GIVE FULL REVIEW TO EACH ISSUE RAISED BY THE CAPITAL DEFENDANT UPON HIS APPEAL TO THAT COURT.

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IN THE

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DEWAINE POINDEXTER,

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THE STATE OF OHIO,

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PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF OHIO

PETITION

Dewaine Poindexter, Petitioner herein, respectfully prays for an order granting a Writ of Certiorari to review the judgment of the Supreme Court of Ohio affirming his conviction and death sentence for aggravated murder, aggravated burglary, kidnaping, felonious assault and attempted aggravated murder.

OPINIONS BELOW

The decision of the Supreme Court of Ohio affirming Dewaine Poindexter's convictions and death sentence was rendered March 23, 1988, is reported at 36 Ohio St.3d 1, 520 NE2d 568, and is attached hereto as Appendix A. The decision of the Court of Appeals, which is unreported, is attached hereto as Appendix B. The trial court's opinion justifying the death sentence appears as Appendix C. The decision of the Supreme Court of Ohio, denying rehearing on April 20, 1988, is attached hereto as Appendix D. The opinions being voluminous, they are presented in a separately bound appendix.

JURISDICTION

This Petition is timely filed, within 60 days of the judgment below on April 20, 1988, denying Petitioner's timely application for rehearing, and is founded upon 28 U.S.C. 1257(3), Petitioner asserting here, and in the courts below, violations of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions being voluminous, they are appended hereto as Appendix E.

STATEMENT OF FACTS

Dewaine Poindexter, Petitioner herein, stands convicted by the Court of Common Pleas of Hamilton County, Ohio, on all counts of a six-count indictment which charged him with two counts of the aggravated murder of Kevin Flanaghan, aggravated burglary, felonious assault, kidnaping, and attempted aggravated murder. Sentenced to death on two counts, and maximum consecutive sentences on all the other counts, he appealed. From the affirmance of his convictions and death sentence by the Court of Appeals and the Ohio Supreme Court, Dewaine Poindexter brings this Petition.

Dewaine Poindexter had lived for about two years with Tracy Abernathy, who bore him two sons (R. 368-9). In the fall of 1984, Dewaine was sentenced to six months in the Community Correctional Institution (CCI) for an assault on Tracy. He was released on February 15, 1985. During his incarceration, Dewaine became disturbed because he had heard that Tracy was prostituting herself, a fact she did not deny at trial (R. 376-377). Some time after Dewaine was incarcerated, Tracy began living with Kevin Flanaghan in the Fay Apartments in the Fairmount area of Cincinnati.

Tracy testified that she and Flanaghan were asleep in their townhouse on the morning of February 19, 1985, when they heard glass breaking downstairs. They went downstairs to investigate, and were met by a man she identified as Dewaine on the stairs. He was armed with a pistol and ordered them

back up the stairs and into their bedroom. The gunman shortly thereafter fired one shot into Flanaghan's chest; Flanaghan fell back on the bed and died within minutes, as the bullet had severed an artery (R. 555-6).

A neighbor had witnessed the break-in and had alerted the security guard at the apartment complex, John Hurt. Hurt responded and was confronted by the gunman and Tracy leaving the apartment. The gunman forced Hurt and Tracy back into the apartment, up the stairs, and into the bedroom. Hurt was forced to kneel facing the gunman, who fired a shot from a distance of 18 inches or so to either side of Hurt's head, and fired once again when (according to Hurt) the gun was pointed at his head, but the gun did not fire. Hurt identified the gunman as Dewaine Poindexter (R. 405-6).

The gunman then forced Tracy and Hurt outside at gunpoint, and fled. Another neighbor, Andrew Leonard, confronted a man he identified as Dewaine, who threw a gun into a dumpster (R. 428). The police had been summoned by Hurt, and Leonard pointed the dumpster out to officer Luebbe, who recovered the weapon. Ballistics tests indicated that this gun had been used to shoot Flanaghan (R. 600). Police experts testified to the ballistics and also that Dewaine's fingerprint was found on a cartridge casing found at the scene of the shooting (R. 573).

One Lee Holmes testified at the trial that he was acquainted with Tracy Abernathy, and knew Dewaine to see him. Holmes was incarcerated at CCI from February 8 to April 30, 1985, and testified that he had had a conversation with Dewaine while both were incarcerated there, in which conversation, according to Holmes, Dewaine threatened to kill the person that Tracy was going with (R. 474).

After the trial court denied motions for judgment of acquittal (R. 611, 619), and to require the state to elect between aggravated murder counts (R. 620), the jury convicted Dewaine as charged of two counts of the aggravated murder of Flanaghan, and two death specifications to each count, four

specifications in all, (1) that the homicide occurred during the perpetration of aggravated burglary, and (2) that the homicide was part of a course of conduct involving the purposeful attempt on the lives of more than one person. Dewaine was also convicted of aggravated burglary, the felonious assault of Tracy, who had been beaten on the head and arm, the kidnaping of Tracy and the attempted aggravated murder of Hurt, the security officer.

The matter proceeded to the penalty phase, and several witnesses testified on Dewaine's behalf, including his mother (R. 738), his sister (R. 725), his grandmother (R. 735), a family friend, John Davis, who was like a father to Dewaine (R. 730); Dewaine made a statement on his own behalf as well (R. 744).

The testimony at the penalty trial indicated that Dewaine was and is quite religious, a good student in school, and never had behavioral problems except when involved in arguments with Tracy and her family; he was a good worker. He had no problems with the law when a juvenile, and none as an adult except for two incidents wherein he argued with Tracy and was convicted of assault and domestic violence or family abuse.

At the argument at the penalty phase, the prosecutor was permitted to quote from an opinion of the Supreme Court of the United States that capital punishment was a legitimate response to the moral outrage of society, and the prosecutor referred to five juvenile court involvements of Dewaine, none of which exist. The trial court instructed the jury to weigh the aggravating circumstances Dewaine was convicted of committing, (four in number, two for each count of the aggravated murder of the same victim) against the mitigating factors presented. The jury recommended death, and the trial court sentenced Dewaine to death on both counts of aggravated murder (R. 813), and consecutive maximum terms of incarceration on all other counts (R. 814-815).

The Court of Appeals affirmed the decision of the trial court in all particulars, as did the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD DECIDE THE EXTENT TO WHICH THE RELIABILITY OF A DEATH SENTENCE, REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS, IS COMPROMISED BY THE IMPOSITION OF THE PENALTY OF DEATH FOLLOWING IMPROPER AND PREJUDICIAL ARGUMENTS BY PROSECUTORS AT THE PENALTY PHASE OF CAPITAL TRIALS, MISSTATING THE EVIDENCE AS TO THE EXISTENCE OF A STATUTORY MITIGATING FACTOR.

THE ISSUE

WHETHER A DEATH VERDICT BY A JURY IS CONSTITUTIONALLY UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WHERE IT FOLLOWS THE FALSE STATEMENT BY THE PROSECUTOR DURING ARGUMENT AT THE PENALTY PHASE, SEEKING TO NEGATE THE EXISTENCE OF THE STATUTORY MITIGATING FACTOR OF LACK OF A SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONVICTIONS AND/OR JUVENILE DELINQUENCY ADJUDICATIONS, TO THE EFFECT THAT THE ACCUSED HAD HAD FIVE PRIOR CONTACTS WITH THE JUVENILE JUSTICE SYSTEM, WHEN IN FACT THE OFFENDER HAD HAD ABSOLUTELY NO CONTACTS WITH THE JUVENILE JUSTICE SYSTEM.

One of the statutory mitigating factors required to be considered by the sentencer under Ohio's capital punishment statute is "The offender's lack of a significant history of prior criminal convictions and delinquency adjudications," R.C. 2929.04(B)(5). Petitioner presented evidence at the penalty trial that he had only two prior convictions, both involving his paramour Tracy Abernathy, and both misdemeanors. But during argument at the penalty phase, the prosecutor stated:

> He was involved in the first trial, you heard with her, five different times. Five times he came into contact with the juvenile justice system, each escalating a little bit until he reached the big time. He got the gun, and he killed somebody.

(R. 771; emphasis added).

It is undisputed that the statement that Petitioner came into contact with the juvenile justice system five times is, simply, totally false. Petitioner had no juvenile record of any adjudications of delinquency, nor even any "contacts." The Court of Appeals concluded as much: "the record is clear that Poindexter had no juvenile record." (Op. p. 10). Petitioner and his witnesses so testified at the penalty trial. And our prosecutor made this erroneous statement in the final portion of the argument, when the defense could not respond. It is, of course, error for the prosecutor during

argument in any criminal case, to argue facts not in the record, State v. Dean, 74 Ohio App. 540 (1953), State v. Debo, 8 Ohio App.2d 325 (1966). This argument doubtless played a significant part in the jury's decision for death.

Under the Ohio capital sentencing scheme, the jury must first determine the existence of one or more of the statutory mitigating factors [including an open-ended factor permitting the jury to consider any other relevant mitigating factor in addition to those specifically enumerated in the statute, R.C. 2929.04(B)(7)]. The jury must then weigh the mitigating factors against the statutory aggravating factor(s) of which they have previously convicted the offender. If the jury is convinced beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, they must return a death "recommendation." If, however, they are not convinced beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, they must return a life recommendation. That life recommendation is absolutely binding upon all judges of all courts.

The jury's recommendation of death, therefore, is an indispensable condition precedent to a death sentence. And the Ohio Supreme Court has recognized that a capital defendant has an absolute right to have his jury participate in sentencing, State v. Penix (1987), 32 Ohio St. 3d 369, 513 N.E.2d 744: "The role of the jury is integral to the sentencing process in death cases. While a recommendation by the jury that the death penalty be imposed must be reviewed and reweighed by the trial and appellate courts, a jury decision to impose life imprisonment is final." Id., 32 Ohio St. 3d at 373, n3, 513 N.E.2d at 748.

The standard of review in situations such as this is whether "[i]t is . . . possible that the prosecutor's appeal to the jury . . . induced the jury to give Petitioner a harsher sentence than it would have otherwise." State v. Thompson (1987), 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 421(emphasis added). The existence of that possibility here

is incontrovertible. And this Court has adopted essentially the same standard, Caldwell v. Mississippi, 472 U.S. 320 (1985). Just last week, the Court declared in a similar context "Unless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." Mills v. Maryland, ___ U.S.___, 43 Cr.L. 3056, 3058-9 (6-8-88).

But the Ohio Supreme Court avoided the issue, and held that, while the prosecutor's comment was error, it was not plain error (there having been no defense objection), and emphasized that "it is clear that the prosecutor had intended to state that Petitioner's prior contacts were with the criminal justice system and not the juvenile justice system." Opinion, 36 Ohio St. 3d at 5.

The Court thus holds that what the prosecutor must have meant by his statement governs over that which the record indicates is the plain meaning of his statement -- that Petitioner had had five contacts with the Juvenile Justice System -- though it is clear that he had absolutely none. And, of course, mere "contacts" with either the criminal or juvenile justice system would not be relevant to the presence or absence of the mitigating factor in question, as only convictions and delinquency adjudications may be considered.

Of course, the Court does determine that the prosecutor's comments constituted error; but then proceeds to hold the error is not plain error, citing, inter alia, State v. Rahman (1986), 23 Ohio St. 3d 146, 492 N.E.2d 401. That case also held that prosecutorial misconduct in argument was not plain error under the facts and circumstances of that case.

But Rahman is quite different from this case. This is a capital case. And the comments attacked here occurred not during the guilt phase, but during the penalty phase. The jury at the penalty phase of a capital proceeding is undertaking the task of finding whether mitigating factors exist, and the further, most delicate, task of weighing the mitigating factors it has found to exist against the statutory aggravating factors of which it has already convicted the

accused.

The injection of five nonexistent juvenile contacts into the calculus skews the result. Petitioner's jury might well have concluded that the two misdemeanor convictions which actually existed constituted the statutory mitigating factor of a lack of a significant history of convictions or delinquency adjudications; but the addition of five (nonexistent) "contacts" with the juvenile justice system there is a reasonable likelihood that the jury concluded that the statutory mitigating factor did not exist (i.e., that Petitioner's prior history was "significant"), and definitely would have caused the jury to assign it less mitigating weight even if the mitigating factor was found to exist.

This error, given the standard of review, is certainly not harmless, but it is plain error of the most grievous sort. This was a close case at the penalty phase; it is not for the Ohio Supreme Court to determine what Petitioner's jury would have done had it not heard about the five nonexistent contacts with the juvenile justice system. The jury must have considered these as <u>additional</u> contacts, as there was no evidence presented at that point of any juvenile contacts. In determining whether Petitioner lacked a significant history of prior convictions and/or adjudications, the jury must necessarily have considered the five juvenile contacts referred to by the prosecutor.

Finally, it is to be noted that the jury would be justified in assuming that the prosecutor spoke the truth, as the prosecutor would certainly be in possession of Petitioner's prior criminal and juvenile record. The fact that the prosecutor made this reference adds to the weight the jury would give it, and to the prejudice suffered by Petitioner.

The prosecutor may well here have accidentally misspoken. But the effect upon Petitioner's jury is the same whether the prosecutor accidentally and unintentionally misspoke, or whether the prosecutor deliberately utilized improper, unfair

and "dirty tricks" in order to secure the death of another human being by unethical means. The undersigned is personally acquainted with the prosecutor who made this argument, who is a man and a lawyer of integrity, and would be fairly certain that the remark was an innocent mistake, and not a deliberate attempt to gain an unfair advantage with Petitioner's jury. But the prejudice to Petitioner's case is the same, whatever the motivation. And Petitioner is entitled to a reversal of his death sentence as a result.

Finally, it should be noted that the Ohio Supreme Court ignored the question, fairly raised in Petitioner's brief, that the failure of defense counsel to object to this argument constituted the ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States. Because we contend that the error is "plain error," should this Court agree, it is unnecessary to reach the ineffective counsel argument. The Court of Appeals ruled on the merits of the claim of error in the prosecutor's argument, and also specifically found that there was no ineffective assistance. The Ohio Supreme Court also ruled on the merits of the claim as "plain error," but failed to address the alternative, that the failure to object was ineffective assistance. In any event, neither Ohio appellate court held that the issue was waived because of the failure to object, and decided the issue -- incorrectly -- on the merits.

II.

IT IS TIME FOR THE COURT TO ADDRESS THE PROBLEM IN DEATH PENALTY LITIGATION CREATED BY THE INCREASING USE BY PROSECUTORS OF QUOTATIONS FROM DECISIONS OF THIS COURT, TAKEN OUT OF CONTEXT, TO PERSUADE JURIES TO EXECUTE CAPITAL DEFENDANTS.

<u>THE ISSUE</u>

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION ARE PREJUDICIALLY VIOLATED BY THE USE BY PROSECUTORS ARGUING FOR THE DEATH PENALTY IN THE PENALTY PHASE OF A CAPITAL TRIAL OF SELECTIONS OF PRIOR OPINIONS OF THIS COURT, OUT OF CONTEXT, TO PERSUADE THE SENTENCING JURY THAT THIS COURT APPROVES OF CAPITAL PUNISHMENT.

At the argument at the penalty trial in this case, the prosecutor, in attempting to persuade the jury to sentence

Petitioner to death, stated, after telling the jury he was quoting from an opinion of the Supreme Court of the United States:

> I will quote: "capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an organized society that asks its citizens to rely upon legal processes rather than self-help to vindicate their wrongs. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.
>
> "When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they deserve, then there are sewn (sic) the seeds of anarchy, of self-help, of vigilante justice and of lynch law."

(R. 775-776). A defense objection to this argument was denied (R. 775).

The Ohio Supreme Court merely held that Petitioner was not prejudiced by these remarks, but did hold that the remarks were not proper and cautioned prosecutors against such arguments in the future, citing State v. Byrd (1987) 32 Ohio St.3d 79, at 82-83, 514 N.E.2d 611, at 615-616.

It is important to note that in Byrd, no objection was lodged to the use of the quote. Here, a timely objection was interposed, and denied.

The use of the above quote, from Gregg v. Georgia, 428 U.S. 153, at 183 (1976), is becoming more and more and frequent in capital litigation penalty trials. There are several more instances of use of the Gregg quote in capital cases from Hamilton County which are presently in the Ohio appellate system. The use of the Gregg quote is not limited to Hamilton County, Ohio, however. There have been many instances of its use in jurisdictions in the South.

The Eleventh Circuit has had occasion to analyze the use of the Gregg quote during capital penalty trials. In Wilson v. Kemp, 777 F.2d 621 (11 Cir. 1985), the Court found reversible error in the use of the quote, and affirmed the granting of Wilson's petition for habeas corpus.

That court held that the Gregg quote was taken out of context in order to give the jury the impression that this

Court had endorsed the use of the death penalty for retributive purposes: "As used by the prosecutor, the Gregg passage conveys the impression that 'this function' -- i.e. capital punishment -- is 'essential in an ordered society.' By contrast, the Supreme Court's meaning was quite different, as shown by a reading of the entire Gregg passage in context." 777 F.2d at 625. The Court concluded as follows:

> . . . one need only read the relevant portion of the prosecutor's closing argument to appreciate its message: the United States Supreme Court has stated that in its view, capital punishment is essential in an ordered society. The fact that many states and countries do not have capital punishment and yet enjoy ordered societies belies this conclusion, which in any event has never been expressed by the Supreme Court. . . . Therefore, we conclude that the prosecutor's use of the passage was improper argument.

The Eleventh Circuit stated the reasons that this argument, which it concluded improper, was prejudicial:

> The prosecutor's selective quotation from Gregg told the jury that the Supreme Court endorses capital punishment, but also that the Supreme Court views capital punishment as essential in an ordered society. This placed the weight of opinion from the nation's highest judicial officers on the side of imposing the death penalty. . . . When core Eighth Amendment concerns are substantially impinged upon, . . . it is understandable that confidence in the jury's decision will be undermined.

777 F.2d at 627.

It is apparent that the Gregg quotation is being used all over the country by prosecutors anxious to obtain a death sentence. The use of this quote probably results from a prosecutor's seminar somewhere where the argument was urged as a way to secure a death verdict from a jury. While this is doubtless true, the use of the quotation also violates the Eighth Amendment in several respects.

In Ohio, the sentencing jury's responsibilities are limited. The jury must, at the penalty phase, first establish whether or not any mitigating factors have been established. The jury then must weigh the mitigating factors it has found to exist against the aggravating factor(s) of which it convicted the accused at the guilt phase of the trial. If the aggravating factor(s) outweigh the mitigating factors beyond a reasonable doubt, then the death penalty is required. Otherwise, the jury recommends a sentence of life, with either

20 or 30 full years to parole.

Thus, the opinion of this Court as to the desirability of the death penalty is completely irrelevant to the decision to be made by the sentencing jury. The only possible purpose for the injection of the Gregg quotation by the prosecutor is as a thinly veiled attempt to advise the jury that the Supreme Court of the United States says that it's all right to kill this defendant as a legitimate response to the public demand for retribution. And, of course, arguments for convictions or particular sentences to satisfy public demand are constitutional error, State v. Byrd, supra., State v. Davis, 60 Ohio App.2d 355, 397 NE2d 1215 (1978).

No question has been more vexatious in American Jurisprudence in the last twenty years than has capital punishment. This Court has, as has the American public, been sharply divided upon the constitutionality of capital punishment. After years of litigation, the Court has distilled the Eighth Amendment requirements to conclude that capital sentencing processes for the states which desire capital punishment be subject to definite, ascertainable standards to channel sentencing discretion so that the justice of death sentences, when imposed, be as reliable as possible. But this Court has never stated that capital punishment is essential to an ordered society.

The injection of the misrepresented position of this Court into the capital sentencing process for the purpose of obtaining the execution of a human being is an insult to this Court as well as an affront to the Bill of Rights.

The Court is urged to grant certiorari and to reverse the death sentence imposed upon Petitioner, and thereby to put a stop once and for all to the flagrant misuse of this Court in an attempt to exterminate citizens through improper, unconstitutional, and prejudicial methods.

III.

DESPITE THE REMAND BY THIS COURT TO THE OHIO SUPREME COURT IN ROGERS V. OHIO, ... U.S. ..., 106 S.Ct. 518, FOR RECONSIDERATION IN LIGHT OF CALDWELL V. MISSISSIPPI, THAT COURT CONTINUES TO AFFIRM DEATH SENTENCES WHERE JURIES HAVE RETURNED DEATH VERDICTS AFTER HAVING BEEN INSTRUCTED THAT THE JURY IS NOT ULTIMATELY RESPONSIBLE FOR IMPOSITION OF THE DEATH SENTENCE.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE IMPOSITION OF THE DEATH SENTENCE AFTER A JURY DEATH VERDICT WHERE THE JURY IS INSTRUCTED THAT THEIR "RECOMMENDATION" IS ONLY A RECOMMENDATION AND THAT ACTUAL SENTENCE SHALL BE IMPOSED BY THE TRIAL COURT AFTER "ADDITIONAL PROCEDURES" ARE CONDUCTED.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN CALDWELL V. MISSISSIPPI.

The trial court instructed the jury at the penalty trial that:

> You must understand, however, that a jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the Court follows certain additional procedures required by the laws of this State.
>
> Therefore, even if you recommend the death penalty, the law requires the Court to decide whether or not the defendant will actually be sentenced to death or to life imprisonment.

(R. 787).

Petitioner contended below that this instruction violated the rule announced in Caldwell v. Mississippi, 472 U.S. 320 (1985), to the effect that a death sentence was constitutionally unreliable in violation of the Eighth Amendment where the sentencing jury was told prior to their decision for death that their decision would be reviewed, thus attenuating their sense of responsibility for the ultimate result.

On February 29, 1988, this Court denied the Petition for a Writ of Certiorari in Steffen v. Ohio (1988), ...U.S...., 108 S.Ct. 1089, in a decision which generated three dissents and an opinion dissenting from the denial of certiorari with respect to the issue, present in this case, which was previously ruled upon by the Court in Caldwell.

The dissent emphasized that "a majority of this Court has never expressed a view as to the constitutional status of accurate and nonmisleading instructions that minimize jury

responsibility by emphasizing the preliminary nature of their decision." 108 S.Ct. at 1091.

Since the denial of certiorari in Steffen, the Court has granted certiorari in Dugger v. Adams __ U.S.__, 108 S.Ct.___, which also involves the application and interpretation of the Caldwell rule. In this case, Poindexter, the Ohio Supreme Court has again affirmed a death sentence imposed after the jury, at the penalty trial, was given the identical instruction as that given in Steffen. Here, Justice Wright, who had dissented from the affirmance of a death sentence in a prior case in which a similar but less prejudicial instruction was given to the jury, State v. Williams, (1986) 23 Ohio St. 3d 16, 490 N.E.2d 906, changed his view and concurred in the affirmance, stating that a footnote in the decision in Darden v. Wainwright, 477 U.S. ___, 106 S.Ct. 2464, had caused him to vote to affirm in this case.

In Caldwell, the Court identified four possible areas of prejudice implicit in advice to the jury that minimized its role in the capital sentencing process: (1) a jury of laypersons might not understand the limited nature of appellate review; (2) a jury unconvinced for death might nevertheless render a death verdict to "send a message" of extreme disapproval; (3) some jurors might correctly assume that judicial review might reverse a death sentence but not a life sentence and thus might render a death verdict to delegate, and thus avoid, responsibility for making the life or death decision; and (4) jurors reluctant to vote for death, particularly on a divided jury, might rely upon the availability of judicial review to give in to a death verdict which is not their true will. Caldwell, supra., 472 U.S. at 330-333.

The dissent from the denial of certiorari in Steffen emphasized that of these four potentially prejudicial aspects of the instruction given here, "only the first is arguably not present in this case because a jury's recommendation of death recommendation of death is subject to plenary judicial review in Ohio." 108 S.Ct. at 1090.

With all due respect to the dissenting Justices, the first of these factors is also present in Ohio, on a de facto basis if not as a matter of law. To be sure, the Ohio death penalty statutes require "independent" review by the trial judge, the intermediate appellate court, and the Ohio Supreme Court, all of which are required by statute to independently consider the evidence in the case, and to weigh de novo the statutory aggravating factors against the mitigating factors presented by the evidence, and to independently determine whether the aggravating factors outweigh the mitigating factors, whether the death sentence is appropriate, and considering other capital cases, whether it is proportionate. R.C. 2929.04-.06.

The problem is, these statutory protections work to the advantage of the accused on only the rarest occasion. To date, with almost 100 individuals on Ohio's death row under the current capital statutes effective in 1981, all of two defendants were sentenced to life by trial judges following a jury decision for death. (State v. Kiser, Ross County; State v. Wright, Cuyahoga County). Only one defendant's death sentence was reduced to life imprisonment by an intermediate appellate court (State v. Donald Glenn, Fifth Appellate District, Guernsey County). And the Ohio Supreme Court has never reduced a death sentence to life under R.C. 2929.05!

In State v. Williams, supra., Justice Wright, dissenting from the decision of the Ohio Supreme Court, accurately stated: "The consequence of a jury's decision regarding imposition of the death sentence in Ohio has not been diminished by the statutory provision for a de novo review. As of February 17, 1986, sixty-three death sentences had been imposed under the Ohio statute. Of that number, only one individual's death sentence was reversed by a court of appeals. Thus, although a jury's decision to recommend imposition of the death penalty may theoretically be only a recommendation, in reality, that decision is virtually final." Id., at 35 (Emphasis in the original).

Consequently, the conclusion here, and in State v. Buell (1986), 22 Ohio St. 3d 124, 489 N.E.2d 795, that the instruction is accurate Ohio law is subject to the significant qualification (which was not communicated to Poindexter's jury) that the Ohio courts were not about to reduce Petitioner's sentence if the jury recommended death; the trial court did not reduce it, the Court of Appeals did not reduce it, and the Ohio Supreme Court did not reduce it either.

It is clear that the judicial review of the jury's decision for death in Ohio, though required by statute, is illusory for all but a very few capital defendants. The prejudice inherent in an instruction such as was given here is thus magnified. Petitioner's jury was encouraged to return a death decision and was reassured that its decision will be reviewed by a trial judge after additional procedures are conducted (which cannot be read to exclude reference to further appellate processes).

But, as we have seen, and as Justice Wright noted, that further review is illusory. Except in the rarest of cases, Ohio death verdicts by juries are not overturned by the statutory "independent review" processes. Consequently, the instruction, while it may be an accurate statement of how the law reads, is not an accurate statement of how the law is actually applied.

It is unjust to sentence a man to death on the basis of a jury verdict which was rendered following an instruction that the jury's decision would be reviewed by one or more higher authorities, Caldwell, supra. It is even more unjust to sentence Petitioner to death following such an instruction and verdict where, despite the letter of the law, there is no meaningful judicial review of the jury's recommendation. The safety net that the instructions assured the jury would correct their decision for death if erroneous does not, for practical purposes, exist. And thus Petitioner labors under a death sentence following a jury verdict, the reliability of which is extremely suspect.

In State v. Williams, supra., Justice Wright dissented

from the affirmance of the death penalty on Caldwell grounds: ". . . I believe it is apparent, in light of Caldwell, that the United States Supreme Court would hold an accurate instruction such as we have here concerning postsentencing procedure to be improper and prejudicial. . . . I am sure that the type of instructions given here were most comforting. However, they were also most devastating to the defendant's right that jurors 'confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision'" 23 Ohio St. 3d at 34.

In this case, in which the Caldwell issue was disposed of in one paragraph, referring to the decision in Buell, Justice Wright concurred in a brief opinion, indicating that his prior misgivings had been resolved (against the defense) by a footnote in the decision in Darden v. Wainwright, and the instruction (the same as given here) is now believed by him to be constitutional, despite the emphatic and convincing dissent from Williams quoted above. See Darden, footnote 15, 106 S.Ct. at 2473.

The Darden footnote, however, supports Petitioner's position. That footnote distinguished Darden from Caldwell in ways that Darden can be distinguished from this case.

Here, as in Caldwell, the instruction was given at the penalty phase of the proceedings, rather than at the guilt phase, as in Darden. In Darden, the trial judge did not approve of the prosecutor's comments and instructed the jury that they were not evidence; here, we have not a comment of a mere prosecutor, but an instruction of law given by the judge which the jurors are required by the law and by their oaths to follow. Our situation is thus even more prejudicial than that in Caldwell, which, like Darden, involved only prosecutorial comment. And finally, in Darden, the comment was held not to have misled the jury into feeling less responsible than it should for the sentencing decision. The instruction here necessarily so misled the jury, especially with its emphasis

upon the nonexistent "additional procedures" which emphasized the merely preliminary nature of their decision.

The injection of the dicta in the Darden footnote into the calculus of Caldwell analysis requires this Court to grant the Petition in this case.

It is believed that this case is the first capital case the Ohio Supreme Court has reviewed in which a Caldwell instruction was given following its decision in State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), in which, in its first review of a capital case under the present statutes, that Court stated that it preferred that such an instruction not be given. The Ohio Supreme Court ignored the fact that the trial court in this case disregarded its expression of disapproval. (Of course, in Buell, which is apparently the lead case on Caldwell instructions in Ohio, the Court indicated that it "emphatically emphasize[s] that the better procedure would be to have no comment by the prosecutor or the trial judge on the question of who bears the ultimate responsibility," 22 Ohio St. 3d at 142-144.)

But, of course, the reason that the better procedure would be not to have such an instruction as was given here is because the instruction creates a constitutionally unacceptable risk that the jury will give impermissibly slight consideration to its awesome responsibility. And that is not a matter of procedure -- it is a matter of fundamental constitutional law, the interpretation of which, in the final analysis, is this Court's responsibility.

Because much remains to be written on the slate of Caldwell jurisprudence, because the instruction here was so prejudicial, because the Court is still attempting to eliminate confusion in the application of Caldwell by the lower courts, viz. Dugger v. Adams, and the dissent in Steffen, the Court is most respectfully urged to grant the Petition herein, to review the judgment below, and to reverse Petitioner's death sentence.

IV.

THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT WHERE STATES GRANT PLENARY REVIEW ON THE MERITS BY THE STATE SUPREME COURT OF ALL APPEALS WHERE CONVICTIONS AND DEATH SENTENCES HAVE BEEN AFFIRMED BY THE INTERMEDIATE APPELLATE COURTS, THE STATE SUPREME COURT MUST GIVE FULL REVIEW TO EACH CONSTITUTIONAL ISSUE RAISED BY THE CONDEMNED APPELLANT, AND MAY NOT CONSTITUTIONALLY DISPOSE OF SUCH ISSUE SUMMARILY.

THE ISSUE

WHETHER THE EIGHTH AMENDMENT REQUIREMENT OF RELIABILITY IN THE IMPOSITION OF THE DEATH SENTENCE REQUIRES A STATE SUPREME COURT, MANDATED CONSTITUTIONALLY TO CONSIDER APPEALS WHERE THE DEATH SENTENCE HAS BEEN AFFIRMED, TO GIVE FULL REVIEW TO EACH ISSUE RAISED BY THE CAPITAL DEPENDANT UPON HIS APPEAL TO THAT COURT.

In this case, the only syllabus prepared by the Ohio Supreme Court states as follows:

> When issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case.

Ohio follows the rule that, except in per curiam opinions by the Ohio Supreme Court, the only binding rule of law in a decision is that set forth in the syllabus.

The Ohio Supreme Court in this case summarily rejected without exposition Petitioner's contentions (1) that the trial court's instructions to the jury that their recommendation was not binding and thus impermissibly reduces the jury's sense of responsibility and reduces the reliability of the death sentence (under Caldwell v. Mississippi, supra.); (2) that the use of the same felony twice, to elevate the murder to aggravated murder, and then again to capital aggravated murder was unconstitutional; (3) that the Ohio death penalty statute was unconstitutional and applied in a racially biased manner; and (4) that the statutorily required proportionality review was constitutionally infirm because it did not permit consideration of cases where the death penalty was not imposed. The summary rejection of these issues consumed only a few paragraphs. See 36 Ohio St. 3d 3 and 4. Thereafter, the Ohio Supreme Court applied the new rule coined in this case with a vengeance in State v. Spisak, 36 Ohio St. 3d 80, 521 N.E.2d 800, affirming in but five pages a conviction and death sentence in a case in which "Appellant's merit brief,

reply brief and attached appendix filed in this court comprise over nine hundred pages, all of which supplement a substantial, but average-sized, record of the proceedings in the lower courts," Id., 521 N.E.2d at 802, n1. Spisak alleged no less than sixty-four claims of error, practically all of which were summarily rejected without a meaningful discussion by the Ohio Supreme Court. In Spisak, the Ohio Supreme Court cited this case, State v. Poindexter, as the controlling authority permitting it to summarily decimate Spisak's case. And, as has been demonstrated, a goodly portion of Petitioner's appeal to the Ohio Supreme Court was disposed of in the same manner.

The Ohio Supreme Court is a discretionary review court, possessing the ability to refuse to hear cases on their merits, subject to certain exceptions. One of those exceptions, in which the Ohio Supreme Court is required to decide the merits of an appeal, is where a conviction and death sentence have been affirmed by an intermediate appellate court, O. Const. Art. IV.

Petitioner contends here that where a state guarantees a merit appeal to the state supreme court in capital cases, then the right to a meaningful appeal to that court is guaranteed by the due process clause of the Fourteenth Amendment and the prohibition against cruel and unusual punishments contained in the Eighth Amendment of the Constitution of the United States.

In Gregg v. Georgia, supra., this Court applauded the Georgia statutory appeal process, which was, according to the Court, "designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. . . . It is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously." 428 U.S. at 205, 96 S.Ct. at 2940. This Court there concluded that "[t]he provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty." 428 U.S. at 206, 96 S.Ct. at 2940.

But here, the Ohio Supreme Court abandoned its

constitutional duty to give a meaningful appeal to this Petitioner, whose conviction and capital sentence had been affirmed by the intermediate appellate court, and disposed of several constitutional claims summarily. These claims include one (the Caldwell issue) in which the giving of an identical instruction as that given here generated three dissents from this Court's denial of certiorari in Steffen v. Ohio, supra.

Certainly, these are not frivolous issues, and Petitioner's death sentence cannot be held to be constitutionally reliable when no less than four substantial constitutional questions are not given full consideration by a state appellate court required by its own Constitution to do so.

Where states grant rights to those they seek to prosecute, and even to exterminate, such as Petitioner here, the due process clause of the Fourteenth Amendment to the United States Constitution protects those rights, Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254. And where the lives of those citizens is claimed by such a state to be forfeit, the Eighth Amendment guarantees that the states shall faithfully extend to those defendants those rights, including the right to a meaningful appeal, which the state has extended to the accused, Gregg v. Georgia, supra.

CONCLUSION

For the reasons stated, the Court is urged to grant this petition for a Writ of Certiorari, and to reverse the convictions and death sentence imposed by the Ohio Courts.

Respectfully submitted,

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87-7311

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DEWAINE POINDEXTER,

Petitioner

-vs- NO. _____

THE STATE OF OHIO,

Respondent

On Writ of Certiorari to

The Supreme Court of Ohio

APPENDIX TO THE

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF OHIO

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APPENDIX A

OPINION OF THE SUPREME COURT OF OHIO

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF OHIO

JANUARY TERM, 1988.

HON. THOMAS J. MOYER, CHIEF JUSTICE.
HON. A. WILLIAM SWEENEY,
HON. RALPH S. LOCHER,
HON. ROBERT E. HOLMES,
HON. ANDY DOUGLAS,
HON. J. CRAIG WRIGHT,
HON. HERBERT R. BROWN, } JUSTICES.

THE STATE OF OHIO, APPELLEE, *v.* POINDEXTER, APPELLANT.

[Cite as State *v.* Poindexter (1988), 36 Ohio St. 3d 1.]

Criminal law—Aggravated murder—Previously considered and decided issues of law raised anew in subsequent capital cases may be summarily disposed of.

O.Jur 3d Criminal Law §§ 1782, 1845.

When issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case.

(No. 87-243—Decided March 23, 1988.)

APPEAL from the Court of Appeals for Hamilton County.

During February 1985, Dewaine Poindexter, appellant herein, was serving a sentence in the workhouse (Community Correctional Institution) for felonious assault on his former girlfriend and the mother of his two children, Tracy Abernathy. On February 11 or 12, 1985, appellant confided in a fellow inmate that Abernathy was "* * * going with some other guy," and that appellant was going to kill the man.

On February 15, 1985, appellant was released from prison. On February 19, 1985, at approximately 10:30 a.m., Abernathy, Kevin Flanaghan and

Abernathy's son, Michael, were asleep on the second floor of Abernathy's townhouse apartment in Cincinnati, Ohio. They were awakened by the crash of breaking glass. As Abernathy and Flanaghan started to investigate the noise, they were confronted by an armed man, appellant, as they reached the top of the steps. Appellant ordered Abernathy and Flanaghan back into the bedroom and asked Flanaghan to identify himself. Just as Flanaghan stated that his name was Kevin, appellant, who was aiming a revolver at Flanaghan's chest, pulled the trigger. The weapon misfired, emitting only a clicking noise. Thereupon, appellant aimed the weapon and pulled the trigger a second time. This time the weapon fired, striking Flanaghan in the chest[1] and knocking him back onto the bed where he died a short time thereafter. Appellant then assaulted Abernathy, striking her on the face, and ordered her to pick up her one-year-old son and go downstairs to the living room.

About the time of Abernathy's beating, John Hurt, an unarmed security guard for the apartment complex, arrived on the scene. Hurt initially went to the rear of the apartment where he found a broken window. Upon hearing screams and seeing a man and a woman move toward the front door of the apartment, Hurt ran to the front of the apartment in time to observe appellant and Abernathy coming out.

Abernathy told Hurt that her boyfriend had been shot. Hurt, walking in front of appellant, followed Abernathy upstairs to Flanaghan's body. While there, appellant produced the pistol from his pocket, ordered Hurt to kneel on the floor and announced that he was going to kill both Hurt and Abernathy. Appellant aimed the revolver at Hurt's head and, from a range of eighteen to twenty inches, fired two shots. Both shots missed. When appellant attempted to fire a third shot, the weapon misfired. Appellant thereupon left the bedroom and was heard reloading the revolver. As soon as appellant left the room, Hurt radioed for police assistance.

After reloading, appellant reentered the bedroom, pistol-whipped Abernathy twice and ordered Hurt and Abernathy to accompany him out of the apartment. Once they were all outside, a Cincinnati police cruiser arrived on the scene and appellant fled on foot. Not long thereafter, appellant's pistol was recovered from a nearby trash dumpster and appellant was arrested without incident at his sister's apartment.

On March 1, 1985, appellant was indicted on two counts of aggravated murder with death penalty specifications in violation of R.C. 2903.01 and 2929.04,[2] one count of aggravated burglary. The second count charged aggravated murder with prior calculation and design. Both counts of the indictment contained the following death penalty specifications: that the offense was committed while appellant was committing aggravated burglary and he was the principal offender of the aggravated murder, in violation of R.C. 2929.04(A)(7), and that the offense was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons, in violation of R.C. 2929.04(A)(5).

[1] The chief deputy coroner testified that Flanaghan died as a result of a single gunshot wound to the right side of the chest: "The bullet * * * passed through the second rib on the right * * * [,] entered the chest, nicking the right lung * * * [,] passed through the main artery arising from the heart, * * * passed through the left lung, left the chest on the left side between the second and third ribs, and ended up against the shoulder blade on the left."

[2] The first count charged aggravated murder while committing aggravated bur-

burglary in violation of R.C. 2911.11, one count of felonious assault in violation of R.C. 2903.11, one count of kidnapping in violation of R.C. 2905.01, and one count of attempted aggravated murder in violation of R.C. 2903.01 and 2923.02.

Appellant's trial began on May 9, 1985, and concluded May 15, 1985. The jury found appellant guilty on all counts of the indictment. The subsequent penalty hearing resulted in a recommendation by the jury that appellant be sentenced to death. The trial court, upon completion of its required independent weighing of the mitigating factors against the aggravating circumstances, adopted the recommendation of the jury and imposed the penalty of death. Additionally, the trial court sentenced appellant to consecutive terms of incarceration of ten to twenty-five years for aggravated burglary, eight to fifteen years for felonious assault, eight to fifteen years for kidnapping, and seven to twenty-five years for attempted aggravated murder.

The court of appeals affirmed the convictions and sentences in all respects.

The cause is now before this court upon an appeal as of right.

Arthur M. Ney, Jr., prosecuting attorney, *Christian J. Schaefer*, *John D. Valentine* and *Patrick Dinkelacker*, for appellee.

Dominic F. Perrino, *Peter Pandilidis* and *H. Fred Hoefle*, for appellant.

DOUGLAS, J. This appeal presents this court with numerous issues concerning appellant's convictions and the penalty of death which was subsequently imposed. For the reasons discussed *infra*, we affirm the judgment of the court of appeals in all respects and uphold appellant's death sentence.

Initially, it should be noted that although R.C. Chapter 2929 requires this court to review capital cases in a certain manner, that chapter does not mandate that this court address and discuss, in opinion form, each and every proposition of law raised by the parties. While we recognize that certain issues of law must be raised to preserve a party's right of appeal in federal court, we will not reconsider and discuss such issues at length in each case. We, therefore, hold that when issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case.

Appellant's first two propositions of law challenge the trial court's instruction to the jury that its recommendation of death would not be binding on the court, and that the final responsibility for the imposition of the death penalty rested with the court. Appellant cites *Caldwell* v. *Mississippi* (1985), 472 U.S. 320, for the proposition that such an instruction impermissibly reduces the jury's sense of responsibility and increases the likelihood of a recommendation of death.

We considered and rejected this argument in *State* v. *Buell* (1986), 22 Ohio St. 3d 124, 143-144, 22 OBR 203, 219-220, 489 N.E. 2d 795, 811-812; *State* v. *Williams* (1986), 23 Ohio St. 3d 16, 21-22, 23 OBR 13, 18-19, 490 N.E. 2d 906, 912; *State* v. *Rogers* (1986), 28 Ohio St. 3d 427, 28 OBR 480, 504 N.E. 2d 52; *State* v. *Steffen* (1987), 31 Ohio St. 3d 111, 113-114, 31 OBR 273, 275, 509 N.E. 2d 383, 387-388; and *State* v. *Thompson* (1987), 33 Ohio St. 3d 1, 6, 514 N.E. 2d 407, 413. We are not persuaded by appellant's arguments to change our position.

Appellant argues in his third proposition of law that the use of the same

felony twice, to elevate the offense to aggravated murder and again to elevate it to capital aggravated murder, fails to narrow the class of offenders eligible for the death penalty. This court has rejected this argument. *State* v. *Jenkins* (1984), 15 Ohio St. 3d 164, 177-178, 15 OBR 311, 322-323, 473 N.E. 2d 264, 279-280. See *State* v. *Buell, supra*, at 141-142, 22 OBR at 218, 489 N.E. 2d at 810-811; *State* v. *Barnes* (1986), 25 Ohio St. 3d 203, 206-207, 25 OBR 266, 269, 495 N.E. 2d 922, 924-925; *State* v. *Steffen, supra*, at 114, 31 OBR at 275-276, 509 N.E. 2d at 388. For the reasons expressed in those decisions, we adhere to that position.

Appellant's fifteenth and sixteenth propositions of law attack the constitutionality of Ohio's death penalty statute and, additionally, assert that it is racially biased. We have determined these issues and have found the statute to be constitutional when measured against similar attacks. See *State* v. *Jenkins, supra*; *State* v. *Maurer* (1984), 15 Ohio St. 3d 239, 15 OBR 379, 473 N.E. 2d 768; *State* v. *Buell, supra*; *State* v. *Steffen, supra*; *State* v. *Zuern* (1987), 32 Ohio St. 3d 56, 512 N.E. 2d 585; *State* v. *Byrd* (1987), 32 Ohio St. 3d 79, 86, 512 N.E. 2d 611, 619. We decline to change our position and, therefore, find these propositions of law not well-taken.

In propositions of law thirteen and fourteen, appellant contends that proportionality review of capital cases must include a review of cases where an offender was eligible to receive, but did not receive, the death penalty. This court has, in *State* v. *Steffen, supra*, previously rejected this argument. See, also, *State* v. *Byrd, supra*, at 86, 512 N.E. 2d at 619; *State* v. *Stumpf* (1987), 32 Ohio St. 3d 95, 107, 512 N.E. 2d 598, 610; and *State* v. *Post* (1987), 32 Ohio St. 3d 380, 391-392, 513 N.E. 2d 754, 765. We decline to alter our current position.

In propositions of law seven and nine, appellant questions the sufficiency of the opinion and the conclusions of the trial court. We have thoroughly reviewed the record and find no evidence that the trial court's conclusions were based, as appellant contends, on the conclusions of other courts. Further, we are convinced that the conditions set forth in R.C. 2929.03(F),[3] *State* v. *Maurer, supra*, at paragraph three of the syllabus (cf. *State* v. *Mapes* [1985], 19 Ohio St. 3d 108, 19 OBR 318, 484 N.E. 2d 140; and *State* v. *Martin* [1985], 19 Ohio St. 3d 122, 19 OBR 330, 483 N.E. 2d 1157) have been complied with by the trial court in its decision. These propositions of law are not well-taken.

In propositions of law eight and twelve, appellant questions the trial court's and court of appeals' weighing of the mitigating factors against the aggravating circumstances. Pursuant to our duty to independently weigh the aggravating circumstances against the mitigating factors, we address these propositions *infra*.

Appellant also contends, in proposition of law ten, that the prosecutor impermissibly commented upon appellant's silence. Appellant argues that the prosecutor's comments that the evidence was "uncontradicted" and "unrebutted" amount to comments regarding appellant's silence. We have considered and rejected a similar argument in *State* v. *Ferguson* (1983), 5 Ohio St. 3d 160, 5 OBR 380, 450 N.E. 2d 265, paragraph one of the syllabus.[4] We find that the comments herein were directed at the strength of the state's case, and not to appellant's silence. Additionally, the jury was specifically instructed by the trial court not to consider for any purpose appellant's failure to testify. Accordingly, appellant's tenth proposition of law is overruled.

Appellant additionally contends, in proposition of law five, that the prosecution incorrectly commented that appellant had been involved with the juvenile justice system on five prior occasions when, in fact, appellant had had no previous contact with the juvenile justice system. Further, notwithstanding the lack of a timely defense objection, appellant believes that such a comment is plain error and brings the validity of the death sentence into question. We disagree with both assertions.

We have reviewed the record and it is clear that the prosecutor had intended to state that appellant's prior contacts were with the *criminal* justice system and not the juvenile justice system.[5] Such a misstatement, while error, clearly does not rise to the level of plain error. See Crim. R. 52(B). See, also, *State* v. *Long* (1978), 53 Ohio St. 2d 91, 7 O.O. 3d 178, 372 N.E. 2d 804, paragraph three of the syllabus, and *State* v. *Rahman* (1986), 23 Ohio St. 3d 146, 153, 23 OBR 315, 321, 492 N.E. 2d 401, 408. Accordingly, proposition of law five is overruled.

In proposition of law eleven, appellant claims that the trial court erred by denying appellant's challenge for cause of a member of the jury panel. We have addressed and rejected similar arguments when criminal defendants fail to utilize all their peremptory challenges. See *State* v. *Eaton* (1969), 19 Ohio St. 2d 145, 48 O.O. 2d 188, 249 N.E. 2d 897, paragraph one of the syllabus, vacated on other grounds (1972), 408 U.S. 935; and *State* v. *Carter* (1970), 21 Ohio St. 2d 212, 214, 50 O.O. 2d 446, 447, 256 N.E. 2d 714, 715-716, vacated on other grounds (1972), 408 U.S. 936. Appellant failed to utilize six of his available twelve peremptory challenges. Accordingly, we find this proposition not well-taken.

In proposition of law six, appellant contends he was convicted and sentenced to death twice for killing a single person. We disagree. The record provides no factual foundation for appellant's contention. The trial court instructed the jury that there were only two aggravating circumstances under the first and second counts. Further, as there is only one order of execution, there can be only one conviction. See R.C. 2941.25(A) and *State* v. *Henderson* (1979), 58 Ohio St. 2d 171, 12 O.O. 3d 177, 389 N.E. 2d 494, wherein "conviction" includes *both* the guilt determination and the penalty imposition. Only one penalty of death was given to appellant. Thus, only one conviction actually occurred. Accordingly, ap-

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[3] R.C. 2929.03(F) provides in part:

"The court * * *, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth * * *, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances * * * were sufficient to outweigh the mitigating factors."

[4] Paragraph one of the syllabus in *Ferguson, supra*, reads:

"A reference by the prosecutor in closing argument to uncontradicted evidence is not a comment on the accused's failure to testify, where the comment is directed to the strength of the state's evidence and not to the silence of the accused, and the jury is instructed not to consider the accused's failure to testify for any purpose."

[5] Although some question has been raised concerning the accuracy of the record in this case, the court reporter has certified that the transcript is accurate and we will, as did the court of appeals, consider it to be accurate.

pellant's sixth proposition of law is not well-taken.

Appellant contends in his fourth proposition of law that during the closing arguments of the penalty phase in appellant's trial, the prosecutor impermissibly quoted from *Gregg* v. *Georgia* (1976), 428 U.S. 153, for the purpose of eliciting a recommendation of the penalty of death on the basis of a public demand for retribution.[4] We disagree.

This court, in *State* v. *Byrd*, *supra*, at 82-83, 512 N.E. 2d at 615-616, considered the propriety of reading a selection from the *Gregg* v. *Georgia* opinion to the jury during closing arguments. In *Byrd*, we found the practice of quoting from *Gregg* v. *Georgia* to be permissible in that particular instance, but cautioned prosecutors to avoid such closing argument techniques in the future. *Id.*

However, the prosecutor in the instant cause argued this case to the jury fully *two years prior* to our announcement in *Byrd*. More importantly, immediately preceding the prosecutor's quotation from *Gregg* v. *Georgia*, the trial court gave the following cautionary instruction to the jury:

"THE COURT: Ladies and gentlemen, what counsel — and we have instructed you in the other proceeding — what counsel says now in closing argument is not the law. It is not the evidence. The evidence that you will consider is what you heard from the witness stand, plus the exhibits. We d give them some latitude, to mak reasonable inferences based on wha the evidence is.

"With that in mind, we'll let Mr Dinkelacker [an assistant prosecutor] proceed."

Additionally, in its general charge to the jury, the trial court stated:

"• • •

"You are not permitted to change the law nor to apply your own concep tion of what you think the law should be, nor are you to disregard the law i order to avoid an unpleasant decision.

"• • •

"Again, the opening statements of the attorneys, and closing arguments which you have just heard, are not evidence.

"The opening statements and the closing arguments by the attorneys are designed to assist you, but they are not evidence."

Therefore, the jury was instructed to decide the penalty phase on the evidence presented and not on the grounds of retribution or counsel's argument. Further, notwithstanding the quotation from *Gregg* v. *Georgia*, the overall thrust of the prosecutor's argument was to emphasize the strength of the evidence supporting the aggravating circumstances and the lack of evidence supporting the mitigating factors. Accordingly, appellant was not prejudiced by the

[4] "MR. DINKELACKER: As I stated, ladies and gentlemen, this is from the Supreme Court of the United States, *Gregg* vs. *Georgia*. I will quote: 'Capital punishment is an expression of society's moral outrage at particularly offensive conduct. Its [*sic*, "This"] function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs,' and I will quote specifically from Justice Stewart [in *Furman* v. *Georgia* (1972), 408 U.S. 238, 308, concurring opinion]: ' ["]The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.

" '["]When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they deserve, then they have sewn [*sic*, "there are sown"] the seeds of anarchy, of self-help, vigilanty [*sic*] justice, and lynch law.["] ' "

reading of the quotation, and his fourth proposition of law is without merit.

We pause, once again, to caution that our decision herein does not condone the use of such closing argument techniques in capital cases. As we have stated both *supra* and in *State* v. *Byrd*, *supra*, such trial tactics are not proper. Although we have found no prejudicial effect in the quoting technique in the case now before us, this does not imply that the same result will be reached in other cases.

We now undertake the required independent weighing process to determine whether the aggravating circumstances that appellant was found guilty of committing outweigh the mitigating factors in this case. R.C. 2929.05(A).

The aggravating circumstances found to exist herein were that appellant, as the principal offender, committed the offense of aggravated murder of Kevin Flanaghan while he was committing or attempting to commit the offense of aggravated burglary, and that appellant committed the offense of aggravated murder of Kevin Flanaghan as part of a course of conduct involving the purposeful killing or attempt to kill both Kevin Flanaghan and John Hurt.

Appellant presented four witnesses, including his sister, his mother and his grandmother, in the penalty phase of the proceeding. Additionally, appellant addressed the jury with an unsworn statement. Appellant's witnesses testified that appellant was a religious person, a good student and steady worker, that appellant never had behavioral problems except those involving Tracy Abernathy and that appellant had no problems with the law as either a juvenile or an adult except the incidents with Abernathy, which resulted in convictions for felonious assault and domestic violence.

Appellant stated that Abernathy's mother instigated everything against appellant, that when he and Abernathy were together, she was a good mother and when he was not there, the children were neglected, that he had respect for both school authority and the law, and that he did not believe in violence or use drugs, profanity or alcohol.

R.C. 2929.04(B) provides that the sentencing authority "shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following [mitigating] factors:

"(1) Whether the victim of the offense induced or facilitated it;

"(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

"(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

"(4) The youth of the offender;

"(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

"(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

"(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death."

We find that of the above-enumerated factors, numbers (1), (2), (3) and (6) do not apply. Number (4) is not com-

pelling as appellant was twenty-five years old at the time of the offense. As to factor (5), appellant's past history of criminal convictions cannot be characterized as insignificant. Appellant's two convictions were of recent vintage and involved both violence *and* Tracy Abernathy. Accordingly, we find, as did the trial court and court of appeals, that this mitigating factor is entitled to little, if any, weight.

Other than the fact that there was testimony that appellant is a religious person, no other information is in evidence which might meet the conditions of factor (7). Accordingly, our view of the totality of the evidence compels us to conclude that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt. Likewise, in considering the "nature and circumstances of the offense," we find nothing mitigating in the cold-blooded execution of one man and the attempted execution of another. From this consideration, we find that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt and, accordingly, uphold appellant's sentence of death.

R.C. 2929.05 requires that, in addition to weighing the aggravating circumstances against the mitigating factors, this court review the proportionality of death sentences. The purpose of this review is to determine whether the penalty of death is unacceptable in the case under review because it is disproportionate to the punishment imposed upon others convicted of the same crime. *State* v. *Steffen, supra.*

Discharging our statutory duty we find that compared with other capital cases decided by this court, the sentence herein is neither excessive nor disproportionate. The penalty of death has previously been imposed and upheld as appropriate, in cases involving execution-style killings and multiple murders. *State* v. *Brook* (1986), 25 Ohio St. 3d 144, 25 OBR 19 495 N.E. 2d 407. We, therefore, hold that a sentence of death herein is neither excessive nor disproportionate to the penalty imposed in similar cases.

Accordingly, the judgment of the court of appeals is hereby affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, LOCHER, HOLMES and H. BROWN, JJ., concur.

WRIGHT, J., concurs separately.

WRIGHT, J., concurring. While the majority asserts that it has not changed its posture with respect to the application of *Caldwell* v. *Mississippi* (1985), 474 U.S. 320, to cases where the jury's responsibility of imposing the death penalty is diminished, I must change mine.

I say this because it appears the United States Supreme Court has modified or "explained" the application of *Caldwell*[1] in the case of *Darden* v. *Wainwright* (1986), 477 U.S. ___, 91 L. Ed. 2d 144. In *Darden*, the trial

[1] *Caldwell* involved comments by a prosecutor during the sentencing phase of trial to the effect that the jury's decision as to life or death was not final, that it would automatically be reviewed by the state supreme court, and intimating that the jury should not be made to feel that the entire burden of the defendant's life was on it. The Supreme Court held that such comments "present[ ] an intolerable danger that the jury will in fact choose to minimize the importance of its role," *id.* at 333, a view that would be fundamentally incompatible with the Eighth Amendment requirement that the jury make an individualized decision that death is the appropriate punishment in a specific case. *Id.* at 340, fn. 7.

court accurately explained and stated the law at the *guilt* stage of the case and prosecutorial efforts to diminish the jury's responsibility were not evident at the sentencing stage.[*] That is generally the state of the record here.

While I still adhere to the position as expressed in my dissent in *State* v. *Williams* (1986), 23 Ohio St. 3d 16, 32-35, 23 OBR 13, 28-30, 490 N.E. 2d 906, 920-922, I must concur with the majority opinion in the case before us.

[*] In footnote 15 of the *Darden* opinion, the court stated:

"The comments in *Caldwell* were made at the sentencing phase of trial and were approved by the trial judge. In this case, the comments were made at the guilt-innocence stage of trial, greatly reducing the chance that they had any effect at all on sentencing. * * *" *Darden, supra,* 477 U.S. at ___, 91 L. Ed 2d at 159.

J.C. PENNEY COMPANY, INC., APPELLANT, *v.*
LIMBACH, TAX COMMR., APPELLEE.

[Cite as J. C. Penney Co. *v.* Limbach (1988), 36 Ohio St. 3d 9.]

Taxation—Use taxes—"Installation charges" exempt from taxation, when.

(No. 86-1833—Decided March 23, 1988.)

APPEAL from the Board of Tax Appeals.

This case is again before this court after remand to the Board of Tax Appeals ("BTA") in *J.C. Penney Co.* v. *Limbach* (1986), 25 Ohio St. 3d 46, 25 OBR 71, 495 N.E. 2d 1. At issue is the application of the use tax to charges paid by appellant, J.C. Penney Co., for conveyor systems in its stores. If the charges are for separately stated installation labor, they are excepted from the tax. If they are for fabrication labor, they are taxable.

The evidence indicates that components of the conveyor system were prefabricated and predrilled at the manufacturer's factory to suit the layout of the store to which they were sent. They were then shipped to the store, unloaded, and bolted together. The system was then bolted to the floor of the building. Belts were attached and electricity was run to the motors and electric eyes of power-driven units. No molding, shaping, or changing of form of the system occurred at the site.

In its first decision, the BTA found that installation charges were not exempt from the use tax because R.C. 5741.01(G) does not authorize the exclusion of installation charges from use taxes. We held that such charges could be exempt from the use tax because R.C. 5741.02(C)(2) exempts from the use tax the same charges that are exempt from the sales tax. Since [illegible] charges, if for installation, would be exempt from the sales tax, they would be exempt from the use tax. We remanded the case to the BTA for it to determine whether the charges were for installation because the BTA had stated in a footnote to its decision that the installation was akin to assembly and fabrication.

On remand the BTA found that the

APPENDIX B

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-850394 TRIAL NO. B-850757
Plaintiff-Appellee,	:	
vs.	:	D E C I S I O N.
DEWAINE POINDEXTER,	:	
Defendant-Appellant.	:	

Criminal Appeal from: Court of Common Pleas

Judgment Appealed from is: Affirmed

Independent Review: Aggravating Circumstances Outweigh Mitigating Factors

Appropriateness: Sentence of Death is Appropriate

Date of Judgment Entry on Appeal: December 24, 1986

Messrs. Arthur M. Ney, Jr., Leonard Kirschner, Christian J. Schaefer, John D. Valentine and Patrick Dinkelacker, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. Dominic Perrino, 806 Main Street, Cincinnati, Ohio 45202, and Messrs. H. Fred Hoefle and Peter Pandilidis, 1500 American Building, 30 East Central Parkway, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

Defendant-Appellant Dewaine Poindexter was indicted for six offenses committed on February 19, 1985. The First Count alleged aggravated murder of Kevin Flanaghan while committing aggravated burglary, with two specifications (the offense was committed while appellant was committing aggravated burglary and he was the principal offender of the aggravated murder, and the offense was part of a course of conduct involving the purposeful killing or attempt to kill two or more persons); Second Count, aggravated murder of Kevin Flanaghan purposely and with prior calculation and design, with two specifications identical to those under the First Count; Third Count, aggravated burglary of the permanent habitation of Tracy Abernathy; Fourth Count, felonious assault on Tracy Abernathy with a deadly weapon; Fifth Count, kidnapping of Tracy Abernathy; Sixth Count, attempted aggravated murder of John Hurt.

Poindexter was found guilty of all six offenses in a trial by jury, and the jury recommended the penalty of death. For the reasons set forth in a separately filed Opinion of the trial court under R.C. 2929.03(F), the court imposed a sentence of death for aggravated murder with specifications under both the First and Second Counts. The court also imposed the following: a sentence of ten years (actual incarceration) to twenty-five years for aggravated burglary under the Third Count, consecutive to the prior sentence; a sentence of eight years (actual incar-

ceration) to fifteen years for felonious assault under the Fourth Count, consecutive to the prior sentences; a sentence of eight years (actual incarceration) to fifteen years for kidnapping under the Fifth Count, consecutive to the prior sentences; and a sentence of seven years to twenty-five years for attempted aggravated murder under the Sixth Count, consecutive to the prior sentences.

Appellant's notice of appeal is stated in general terms that appear to include his conviction of and sentencing for all six offenses, but his assignments of error attack only the two counts of aggravated murder and the sentence of death. We conclude that Poindexter does not contest either his conviction or the penalties under the Third through the Sixth Counts.

In the review of a death penalty, we have three tasks under R.C. 2929.05. *State v. Scott* (1986), 26 Ohio St. 3d 92, 95, 497 N.E.2d 55, 58; *State v. Rogers* (1985), 17 Ohio St. 3d 174, 175, 478 N.E.2d 984, 987-88. First, we must address the assignments of error presented by appellant, being seventeen in number. Second, we must independently determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case. Third, we must determine whether the sentence of death is appropriate, after considering whether it is excessive or disproportionate to the penalty imposed in similar cases.

We have studied all death penalty cases reported by the Ohio

Supreme Court, and those decided by this Court. In brief summary, we find no prejudicial error and overrule all seventeen assignments of error, we are persuaded that the aggravating circumstances outweigh the mitigating factors beyond a reasonable doubt, and we decide that the sentence of death is appropriate in this case.

I

At about 10:30 a.m., February 19, 1985, Tracy Abernathy and Kevin Flanaghan, unmarried, were asleep in a second-floor bedroom of her apartment at 2314 Nottingham in the Fay Apartments in Cincinnati. They were awakened by a noise or crash of broken glass in the kitchen on the first floor, and as they came to the top landing of the stairs, they were confronted by Poindexter who was pointing a gun at them. He ordered them back in to the bedroom. Kevin said, "Why do you break in like this? I would have let you in if you would have asked." Poindexter asked, "What is your name, man?" The response was, "My name is Kevin." Immediately he was shot. The weapon did not fire at first ("It clicked"), but it fired on the second pull of the trigger, and the projectile entered Kevin's right chest, and passed to his left side, penetrating his aorta. He fell back on the bed, spoke to Abernathy briefly and died within minutes.

Poindexter punched Abernathy in the eye and ordered her to pick up her one-year-old son Michael and go downstairs. An unarmed security guard for the Fay Apartments, John Hurt, came to

the door of 2314 Nottingham to investigate an anonymous telephone call. Poindexter directed him upstairs to the bedroom, where exhibiting the handgun, he told Hurt to kneel. Appellant fired two shots at Hurt, missing him both times. Poindexter left the room and was heard reloading the weapon. While this was happening, Hurt radioed for police help. Poindexter returned to the room and ordered Hurt and Abernathy (holding Michael) out the front door. At that moment, a police car came on the scene. Poindexter knocked Abernathy and the child to the ground and fled. (Abernathy received a black eye and cuts on the top and front of her head.) Poindexter was observed by a neighbor throwing the handgun in a dumpster. After he was apprehended, he was identified as the assailant by Abernathy, Hurt, the police officer who first arrived on the scene, and the neighbor who saw him dispose of the weapon.

It appears from the evidence that the motivations for Poindexter's conduct were jealousy and anger. He and Abernathy had had an intimate relationship that lasted two years during which she bore two sons, the younger being Michael. The relationship was terminated at her initiative in July 1984; it was an "unpleasant split-up." Abernathy said she had "called the police or become involved with the criminal justice system" about five times. T.p. 369. The last involvement resulted in the imposition of a six-month sentence, from which Poindexter was released five days before February 19, 1985. He accused

Abernathy of prostitution, among other things.

Poindexter filed a notice of alibi before the trial but offered no evidence of any nature in defense at the guilt phase. The statement he gave the police on apprehension was that he was not present and had never been present at the Fay Apartments. Except for this statement, the prosecution's evidence was uncontroverted.

At the sentencing phase of the trial, Poindexter presented four witnesses: his employer, his grandmother, his mother and his sister. All of them stated, in essence, that he was an obedient, honest, peaceful and quiet individual who had not had contacts with law enforcement as a juvenile or as an adult until the events that occurred during and after the termination of his relationship with Abernathy.

II

As noted, we find no merit in any of Poindexter's seventeen assignments of error.

The first assignment of error concerns the sentencing phase of the trial proceedings, during which the judge delivered, without objection, the following instruction to the jury with regard to the imposition of the death penalty:

> You must understand, however, that a jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the Court follows certain additional procedures required by the Laws of this State.

> Therefore, even if you recommend the death penalty, the law requires the Court to decide whether or not the defendant will actually be sentenced to death or to life imprisonment.

T.p. 787.

Poindexter asserts that the instruction was constitutionally impermissible under *Caldwell v. Mississippi* (1985), ___ U.S. ___, 105 S. Ct. 2633, and amounted to plain error because it denigrated the jury's role in the sentencing process by leading the jurors to believe that the responsibility for determining the appropriateness of the death penalty rested elsewhere. In the alternative, he argues that the failure to object to the instruction should now be regarded as an instance of ineffective assistance of defense counsel.

In *State v. Buell* (1986), 22 Ohio St. 3d 124, 489 N.E.2d 795, the Ohio Supreme Court, after considering *Caldwell*, rejected a claim of error predicated upon an instruction markedly similar to that given in the case *sub judice*. Emphasizing that "the better procedure would be to have no comment by the prosecutor or by the trial judge on the question of who bears the ultimate responsibility for determining the sentence in a capital case," the Court concluded nonetheless that, under Ohio's statutory scheme for the imposition of the death penalty, an instruction on the jury's role in recommending a sentence of death is not constitutionally infirm when it is neither inaccurate nor misleading. *Buell, supra*, at 144, 489 N.E.2d at 813.

This Court has followed *Buell* in several recent decisions.

State v. Bedford (Oct. 8, 1986), Hamilton App. No. C-840830, unreported; *State v. Denson* (Oct. 1, 1986), Hamilton App. No. C-850311, unreported; *State v. Beuke* (Mar. 26, 1986), Hamilton App. No. C-840829, unreported. On the basis of these authorities, we now hold that the instruction challenged here did not give rise to reversible error because it was an accurate statment of the law that did not mislead the jury in its consideration of an appropriate sentence for Poindexter.

In his second assignment of error, Poindexter challenges his death sentence on state and federal constitutional grounds by arguing that the same felonies were improperly used to elevate the charges against him, first, from murder to aggravated murder, and then, from aggravated murder to "death-eligible" aggravated murder. We cannot sustain this claim because it has already been squarely rejected both by the Ohio Supreme Court and by this court. *State v. Maurer* (1984), 15 Ohio St. 3d 239, 473 N.E.2d 768; *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 473 N.E.2d 264; *State v. Buern* (June 11, 1986), Hamilton App. No. C-840803, unreported; *State v. Young* (May 14, 1986), Hamilton App. No. C-830757, unreported; *State v. Byrd* (Feb. 5, 1986), Hamilton App. No. C-830676, unreported; *State v. Steffen* (Dec. 11, 1985), Hamilton App. No. C-830445, unreported.

In the third assignment of error, Poindexter asserts that the court erred when it permitted the prosecution to argue in the penalty phase that the trial court should respond to society's

moral outrage and demand for retribution. The prosecutor quoted parts of the United States Supreme Court's opinion in *Gregg v. Georgia* (1976), 428 U.S. 153, 96 S. Ct. 2909; these quoted parts may be characterized as being a justification for the death penalty as a means of channeling the natural "instinct for retribution" into a stabilized system of criminal justice. We find no error, for two reasons. First, the only objection made by defense counsel at the time was to "reading something out of context." There was no objection on the grounds of improper appeal to the jury to impose a death penalty in answer to the public's demand for revenge. Second, the matter quoted from the *Gregg* opinion did not constitute an emotional appeal to satisfy public demand for revenge. The quotations fall well within the permissible scope of closing argument. The prosecutor may present broad as well as specific reasons for imposing the death penalty, and we do not perceive how there can be any error in drawing from the reasoning of the highest court in the land, either with or without attribution. It is equally within the scope of closing argument for defense counsel to argue in general terms that the death penalty is excessive, inappropriate and wrong.

In the fourth assignment, Poindexter claims error stemming from another remark in the prosecutor's closing argument in the penalty phase, on alternative grounds; he claims it was error either because the court "permitted" the remark to be made (there

was no objection) or because Poindexter was deprived of the effective assistance of counsel by the failure to object. In the course of discussing the mitigating factors set forth in R.C. 2929.04(B), the prosecutor said:

> And No. 7: The lack of substantial record. Well, maybe he didn't have a juvenile record, and again you were told part of his record. But look what it consisted of. He did time in the workhouse for hitting somebody, punching somebody. He was involved in the first trial, you heard with her [Abernathy], five different times. Five times he came in contact with the juvenile justice system, each escalating a little bit until he reached the big time. He got the gun, and he killed somebody. So that, again, is not a mitigating factor. (Emphasis added.)

T.p. 770-71.

We hold that there was no prejudicial error. Assuming that the phrase "the juvenile justice system" was an accurate transcription of what the prosecutor actually said (it would be reasonable to assume that the error was in transcription and that the prosecutor said, "the criminal justice system"), the record is clear that Poindexter had no juvenile record. Both his mother, T.p. 739, and his grandmother, T.p. 736, testified he was never in juvenile court, and the prosecutor conceded that these statements were true. As noted in part I, Abernathy testified that during the disengagement from appellant, she had to call the police or become involved in the criminal justice system five times. Defense counsel in effect conceded these five occasions, during closing arguments in the guilt phase. T.p. 634. We hold that reasonable minds could only conclude that the prosecutor inadvertently misspoke when he said "juvenile" instead of "crimi-

nal" and that it was not a violation of defense counsel's duty of faithful representation to fail to object to the remark or to demand it be stricken from the record. A defense attorney could reasonably believe that an objection at that time would draw attention to Poindexter's uncontrollable anger and thus be more prejudicial than advantageous.

Finally, we do not interpret the remark *sub judice* as an attempt by the prosecutor to argue before the jury, or to bring into the trial during closing argument, facts that were not testified to during the trial. *State v. Goodin* (Nov. 23, 1977), Hamilton App. No. C-76510, unreported, is inapposite.

In the fifth assignment of error, Poindexter contends the court erred when it permitted the jury to weigh four aggravating circumstances (rather than two) against the mitigating factors during the penalty phase. The record provides no factual fundament for this contention, much less any attempt by defense counsel to draw the claim of error to the attention of the trial court. The court clearly and unmistakably instructed the jury that there were only two aggravating circumstances under the First Count and the Second Count, T.p. 783-84, and the court did not instruct the jury directly or indirectly to consider those two specifications as though they were somehow multiplied to four.

Appellant's sixth assignment alleges error in imposing "convictions and death sentences on both aggravated murder counts" because the two crimes constitute allied offenses of similar

import under R.C. 2941.25(A) and because only one person was killed. The claim focuses attention on the form of the judgment entry that imposed sentences for the several offenses. The recitations about the First and Second Counts are separately stated. See Appendix A, *infra*, setting forth an extract from the entry of June 12, 1985, T.d. 64. Appellant's argument is that since the findings and the penalty under these two Counts are separately stated, separate sentences of death were imposed. We do not agree.

The plain meaning of the entry of June 12, 1985, in our judgment, is that one and only one death sentence was imposed on appellant; that is, execution on September 6, 1985. We interpret the entry as though the recitations about the First and Second Counts (that is, references to the jury verdicts on each Count and each specification, the jury's recommendation of death, the court's independent weighing of aggravating circumtances against mitigating factors and the opportunity to speak before sentence) were either merged or were grouped under one section of the entry, followed by a single paragraph imposing the sentence of death.

There is only one "conviction" under the First and Second Counts because there is only one order of execution. We have held, and we hold now, that when there are two or more guilty verdicts (or guilty findings) but only one sentence, there is but one "conviction." Under the Ohio Criminal Code, and particularly

R.C. 2941.25(A), the word "conviction" includes both the determination of guilt and the imposition of penalty. *State v. Scruggs* (Mar. 14, 1984), Hamilton App. No. C-830429, unreported; *State v. Strunk* (Dec. 8, 1982), Hamilton App. No. C-811029, unreported; *State v. Reed* (Apr. 9, 1980), Hamilton App. No. C-790050, unreported (reversed on other grounds [1981], 65 Ohio St. 2d 117).

In the instant case, one sentence was imposed on two guilty verdicts. We note a different treatment in other cases. In some, the sentence has been imposed on only one offense, *State v. Scruggs, supra; State v. Strunk, supra*; and in others, the duplicative count or counts has been "set aside." *State v. Osborne* (1976), 49 Ohio St. 2d 135, 359 N.E.2d 78; *State v. Reed, supra*. Conceding that the offenses alleged in the First and Second Counts are allied offenses of similar import under R.C. 2941.25(A), we cannot conceive of any prejudice to appellant in the instant case, because only one sentence was imposed. There can only be one execution, legally and practically.

The seventh assignment of error contends that Poindexter was deprived of his constitutional right to have "his sentence determined by individualized consideration of the factors involving the aggravated and mitigating circumstances of his case." (Emphasis as in appellant's brief.) Poindexter focuses on the following one-sentence paragraph in the trial court's opinion, T.d. 61, at 12:

> The proven facts of Aggravating Circumstances reveal a cruel, willful and cold-blooded disregard for human life and values.

Poindexter states that this same sentence is found in four other opinions filed under R.C. 2929.03(F), albeit in the other cases there was added the phrase "far beyond what this court has seen in other cases" or words to that effect. He contends that the repetition of the quoted sentence "establishes that appellant was denied this crucial constitutional right."

We disagree. Assuming that we can take cognizance of Opinions filed under R.C. 2929.03(F) in other cases and not in the record before us, and assuming appellant's quotations from those other cases are accurate, we find no merit in this assignment. We find in the instant Opinion when read from its four corners that type of individualized and particularized consideration of the offense or offenses and the offender that the United States Supreme Court demands in death cases. We are not willing to lift one sentence from a fourteen-page Opinion that reviews in detail the entire case for and against the accused because that one sentence expresses a revulsion over violent physical cruelty. We are unwilling to give it an emphasized meaning completely inconsistent with the burden and thrust of the rest of the Opinion.

The eighth assignment of error complains that the trial court imposed the death penalty "without proper consideration having been given statutory mitigating circumstance (*sic*)

established by the evidence." The reference is to one paragraph in the trial court's Opinion that discusses the mitigating factors set forth in R.C. 2929.04(B)(5). The targeted paragraph reads:

> (5) "The offender's lack of a significant history of prior criminal conviction (*sic*) and delinquent adjudications." The record in this case indicates two previous convictions for criminal offenses of violence as an adult wherein the victim in both offenses was Tracy Abernathy. Therefore, the Court would deem it inappropriate to give the defendant any consideration pursuant to mitigating factor number five.

T.d. 61, at 10-11.

The weighing of mitigating factors against aggravating circumstances is, by its very nature, a matter of judgment, because no precise, scientific weight can be attributed to any factor or circumstance. Both the jury and the trial court have a broad discretion in reaching their respective conclusions. It is not an abuse of that discretion to place minimal weight on any one factor when the facts indicate its weakness. In the instant case, we do not believe the trial court abused its discretion since Poindexter's prior criminal convictions included violent assaults on the homicide victim; we are unwilling to rule that it is, as a matter of law, an abuse of discretion to state that the court will not consider those earlier attacks as a mitigating factor. Assuming that an accused has a positive personal history without blemish, the court nevertheless may, within reason, consider a "new" criminal course of conduct leading to a homicide as

outweighing that past history. It is then a matter of judgment how much emphasis should be placed on the favorable and the unfavorable elements in the defendant's personal history.

In any event, these same factors must be reweighed independently by this court and the Supreme Court, and thus any deficiency in the trial court's opinion can be corrected.

The mandatory nature of the provisions governing the sentencing opinion was recognized by the Ohio Supreme Court in *State v. Maurer, supra*, paragraph three of the syllabus, which reads:

> The trial court, when it imposes a sentence of death, shall state in a separate opinion its specific findings as to the existence of any mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why these aggravating circumstances were sufficient to outweigh the mitigating factors.

The court went on to say, however, in the text of the decision itself, that no prejudice results from a noncomplying trial court's opinion when an appellate court can correct the error by fulfilling its statutory duty to review independently the appropriateness of the death penalty imposed in a given case. *Id.* at 247, 473 N.E.2d at 778. We have, in fact, done as much in our decisions in *State v. Denson, supra; State v. Sowell* (Aug. 20, 1986), Hamilton App. No. C-830835, unreported; *State v. Carter* (July 23, 1986), Hamilton App. No. C-840121, unreported; *State v. Beuke, supra; State v. Byrd, supra;* and *State v. Steffen, supra.*

In the ninth assignment of error, Poindexter points to another alleged defect in the trial court's Opinion. As Poindexter sees it, the flaw lies in the court's failure to comply with the statutory requirement calling for a statement of the reasons why the aggravating circumstances of the murder in question were found to outweigh the mitigating factors beyond a reasonable doubt. He contends that the invalidity of the Opinion is best demonstrated by the concluding remarks of the trial judge, which include the general statement that "the Aggravating Circumstances do outweigh the mitigating factors advanced by defendant, Dewaine Poindexter, beyond a reasonable doubt as required by O.R.C. 2929.03(D)(3)." By focusing only upon this part of the Opinion, however, he ignores those significant portions in which the trial judge reviews in detail the aggravating circumstances in the case, considers separately the mitigating factors provided by statute and assesses the weight given to each mitigating factor. When the Opinion is read as a whole, we are persuaded that it complies with law by articulating the grounds upon which the judge relied to weigh the scale in favor of the death penalty. Furthermore, even were we to assume some deficiency in the supporting rationale, the asserted error will be cured, as we noted above, by our independent review of the death sentence. *State v. Maurer, supra.*

Poindexter's tenth assignment of error addresses the effect of the following remarks made by the prosecuting attorney during

his closing argument in the guilt phase of the trial:

> Ladies and gentlemen, it is not easy, but the prosecution has the tendency to become somewhat complacent in a case like this. Frankly, the evidence is overwhelming. Quite frankly, the evidence is uncontradicted.
>
> The evidence came from the witness stand. Three eyewitnesses saw this man do it. One bullet contained his fingerprint at the home. That is hard evidence, ladies and gentlemen. That is uncontradicted evidence.

T.p. 666-67.

The argument is that these remarks gave rise to prejudice in two alternative respects. First, Poindexter asserts that the remarks were an impermissible comment upon his constitutional right to remain silent; and second, he contends that the absence of a timely objection to them deprived him of the effective assistance of defense counsel.

Our review of these claims is governed by *State v. Ferguson* (1983), 5 Ohio St. 3d 160, 450 N.E.2d 265, paragraph five of the syllabus reading:

> A reference by the prosecutor in closing argument to uncontradicted evidence is not a comment on the accused's failure to testify, where the comment is directed to the strength of the state's evidence and not to the silence of the accused, and the jury is instructed not to consider the accused's failure to testify for any purpose.

Viewing the remarks of the prosecutor in the context of the entire argument given to the jury, we are persuaded that what was said in the case *sub judice* constituted a fair assessment of the prosecution's evidence against Poindexter, and that any tendency for impropriety was eliminated when the judge cautioned the jury

that Poindexter had a "constitutional right not to take the stand and testify," and that his failure to testify was "not to be considered for any purpose." T.p. 679.

The eleventh assignment of error is that the systematic exclusion from the jury of individuals opposed to the death penalty was in violation of Poindexter's state and federal constitutional rights to have the charges against him tried before a fair and impartial cross-section of the community. It has no merit in view of the line of authorities holding (1) that a jury may be "death-qualified" in advance of the guilt phase of a bifurcated capital prosecution without denying the defendant a fair trial, *State v. Napes* (1985), 19 Ohio St. 3d 108, 116-17, 484 N.E.2d 140, 147-48; *State v. Maurer, supra*, paragraph two of the syllabus; *State v. Jenkins, supra*, paragraph two of the syllabus; *State v. Steffen, supra*, at 9-10, and (2) that those persons may be excluded whose views will prevent or substantially impair the performance of their duties in accordance with the court's instructions and the jury's oath. *Wainwright v. Witt* (1985), ___ U.S. ___, 105 S. Ct. 844, 855, 857-58; *State v. Carter, supra*, at 7; *State v. Byrd, supra*, at 15.

In the twelfth assignment of error, Poindexter puts forth seven distinct challenges to the constitutionality of the death penalty statutes in Ohio, claiming generally a denial of due process and equal protection, as well as an infringement of the prohibition against cruel and unusual punishment. Specifically,

the claims are (A) that the death penalty is totally without penological justification and does not rationally serve any legitimate state interest; (B) that the death penalty is imposed disproportionately in cases involving white victims in an arbitrary, capricious and racially discriminatory manner; (C) that the use of the same operative fact to elevate a homicide, first, to aggravated murder, and then, to "death eligible" aggravated murder permits the imposition of a death sentence upon less proof than that required to sustain a conviction for aggravated murder involving prior calculation and design, and thus fails to narrow capital cases to those where the death penalty is constitutionally appropriate; (D) that the statutes arbitrarily and capriciously permit the imposition of the death penalty upon the slightest outweighing of aggravating circumstances over mitigating factors; (E) that the statutes preclude the consideration of mercy by the jury when the aggravating circumstances outweigh the mitigating factors; (F) that the trial court's authority under Crim. R. 11(C)(3) to dismiss aggravating specifications in the interests of justice upon the acceptance of a guilty plea needlessly encourages such pleas and allows for the arbitrary and capricious imposition of the death penalty; and (G) that the statutes fail to provide acceptable standards for determining the appropriateness of a sentence in the trial court and for reviewing a sentence on appeal.

According to the record, none of the foregoing claims were

asserted in the trial court at the time Poindexter sought a ruling on the constitutionality of the statutory scheme subjecting him to the imposition of the death penalty. The claims have, therefore, been waived for purposes of this appeal under the rule of *State v. Awan* (1986), 22 Ohio St. 3d 120, 489 N.E.2d 277, and *State v. Williams* (1977), 51 Ohio St. 2d 112, 364 N.E.2d 1364, vacated on other grounds (1978), 438 U.S. 911, 98 S. Ct. 3137, unless they can be said to rise to the level of plain error. Crim. R. 52(B); *State v. Adams* (1980), 62 Ohio St. 2d 151, 404 N.E.2d 144; *State v. Craft* (1977), 52 Ohio App. 2d 1, 367 N.E.2d 1221.

In our view, the rule of plain error provides no comfort to Poindexter in this case because the constitutionality of the death penalty statutes has previously withstood challenge under each of the seven grounds now asserted in argument before us. Point (A) was rejected in *State v. Martin* (1985), 19 Ohio St. 3d 122, 483 N.E.2d 1157; *State v. Maurer, supra*, and *State v. Jenkins, supra*; point (B) was found meritless in *State v. Steffen, supra* point (C) is disposed of by the authorities cited in our resolution of the identical claim raised in Poindexter's second assignment of error; point (D) was laid to rest in *Jenkins, supra*, and *Steffen, supra*; point (E) was answered in *State v. Buell, supra*, and *Jenkins, supra*; and points (F) and (G) fail under *Buell, supra*.

The thirteenth assignment of error challenges the trial

court's denial of Poindexter's challenge for cause of juror Joyce A. Nichols. T.p. 256-68. During voir dire by the court and the prosecutor, she said she could be a fair and impartial juror. When asked about "feelings about guns," she said she had "respect for them." During voir dire by the defense, she indicated adverse feelings about the use of guns and answered "yes" to a rambling question whether the use of a gun would prejudice her against the user so she could not be fair and impartial. The trial court took over the questioning and established again that she could be fair and impartial and would follow the law and the evidence. Further questioning failed to dislodge Ms. Nichols from that position. The court stated that defense counsel's question confused her, and in view of the fact that the trial court observed both the questioner and the prospective juror and was aware of all unrecorded but significant factors (such as attitude, demeanor, inflections, emphasis, body language, and other disclosures of feeling), we cannot say that the trial court erred as a matter of law.

The fourteenth assignment of error remonstrates that the trial court's judgment that the aggravating circumstances outweighed the mitigating factors was contrary to the weight of the evidence and was contrary to law because the evidence was insufficient. R.C. 2929.05(A) requires this court to review these claims; reference is to the fourth sentence of that Division. For the same reasons that are set forth in our own weighing in

Part III below, we hold that the evidence supported the court's findings of the aggravating circumstances which defendant was found guilty of committing and that the trial court properly weighed them against the mitigating factors.

Poindexter's fifteenth assignment of error, which asserts that the death penalty in this case was disproportionately severe in violation of federal constitutional guarantees prohibiting cruel and unusual punishment, is a recapitulation of a claim first advanced to us in *State v. Steffen, supra*, and repeated in *State v. Byrd, supra; State v. Beuke, supra; State v. Young, supra; State v. Buern, supra; State v. Sowell, supra*; and *State v. Denson, supra*. Following our analysis in *Steffen*, we hold it without merit here because the states are not bound by a federal rule of proportionality apart from the general requirement that capital-sentencing procedures must objectively focus upon the particularized circumstances of the offense and the offender, and because Ohio's statutory framework reasonably satisfies this standard. *Id.* at 32.

The sixteenth assignment of error states that appellant's death sentence is "disproportionately severe when compared to other cases in Hamilton County in which capital sentencing decisions were made." We note, as we have in all prior death cases, that this statement has not alleged an act, decision or conduct by the trial court that could conceivably be said to be prejudicial error. We overrule this assignment, but we will set

forth our decision on so-called proportionality in Part IV.

In the final assignment of error, it is asserted that the trial judge committed plain error when he instructed the jury in the penalty phase of the trial that they could not be governed by considerations of sympathy in their recommendation of an appropriate sentence for Poindexter. This claim is without merit under *State v. Jenkins, supra*, where the Ohio Supreme Court endorsed such an instruction in paragraph three of the syllabus, by stating:

> The instruction to the jury in the penalty phase of a capital prosecution to exclude considerations of bias, sympathy or prejudice is intended to insure the sentencing decision is based upon a consideration of the reviewable guidelines fixed by statute, as opposed to the individual jurors' personal biases and sympathies.

Besides, the "sympathy" referred to might be sympathy for the victim of the crime, not for the offender.

III

We now undertake, pursuant to R.C. 2929.05(A), the task of weighing independently the aggravating circumstances which Poindexter was found guilty of committing against the mitigating factors presented by him and spread on the record. The aggravating circumstances were reviewed in Parts I and II and will not be repeated here. The mitigating factors are those set forth in R.C. 2929.05(B).

We can discover nothing of mitigating significance in "the nature and circumstances of the offense." The shooting of

Flanaghan was a deliberate and intentional act motivated by jealous rage.

Poindexter's "history, character and background" disclose a religious person ("I believe in the Bible and I read it religiously. I believe very highly in God and always try to live a good and decent life." T.p. 754) and a good student who left high school four weeks before finishing to get a job that was later terminated only because his employer moved his business to Colorado. His parents were divorced when he was very young. Prior to charges brought against him by Abernathy, Poindexter had no criminal record of any nature as a juvenile and as an adult. He felt Abernathy's mother "instigated everything against me, merely due to her dislike of dreadlocks [his hair style]," and he was upset when during his jail term Abernathy spent her time in bars, neglected his two children by her and turned them over to the Welfare Department for four days. Excluding the criminal violations stemming from the break-up of his relationship with Abernathy, his personal history discloses no unfavorable factors; in that respect, his was a "good" life.

Turning to the other mitigating factors listed by number in R.C. 2929.04(B), we conclude:

(1) There is no evidence that Flanaghan deliberately induced or facilitated the attack;

(2) There is no evidence that Poindexter was under any duress, coercion or strong provocation, and the homicide did not stem from any of these causes;

(3) There is no evidence that Poindexter had any

mental disease or defect affecting his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) Poindexter was twenty-three years of age at the time of the offense, and his age (youth) carries no weight in alleviating the deliberateness of the killing, or in alleviating the death penalty;

(5) Poindexter's two prior criminal convictions arising from physical attacks on Abernathy do not weigh in his favor, while his lack of any other criminal or juvenile record does weigh in his favor, but not to an overwhelming degree;

(6) Poindexter was the sole participant in the killing, despite his denial of not having been at the Fay Apartments; at the conclusion of his own sworn statement in the penalty phase, he said, "And the main thing, I didn't kill that man";

(7) There are no factors other than those recited above that are relevant to the validity and appropriateness of Poindexter's death penalty.

In brief, what we have to weigh against the deliberate murder of Flanaghan while burglarizing Abernathy's apartment and purposefully attempting to kill Hurt as well, is a life that is neither outstandingly good nor significantly bad. Under the intent and purpose of the Ohio plan for the imposition of the death penalty, we cannot conclude that the mitigating factors outweigh the aggravating circumstances. On the contrary, we hold that they are outweighed beyond a reasonable doubt.

IV

We now face the determination whether the death penalty is appropriate in this case. We must consider "whether that sentence is excessive or disproportionate to the penalty imposed in similar cases." R.C. 2929.05(A). We believe that the

universe of similar cases which we must consider includes three classes of cases: (1) cases decided by the Supreme Court and officially reported; (2) cases decided by this Court; and (3) cases in which the trial court has filed a sentencing opinion under R.C. 2929.03(F).

Our review of those cases leads us to conclude that the sentence of death imposed upon Poindexter is appropriate and is neither excessive nor disproportionate to the penalty imposed in similar cases within the jurisdiction of this Court.

V

In conclusion, we find:

(1) No merit in any of the seventeen assignments of error or the issues raised thereunder;

(2) The aggravating circumstances of aggravated murder and murder outweigh any and all of the mitigating factors presented by the appellant; and

(3) The sentence of death is appropriate in this case because it is neither excessive nor disproportionate to the penalty imposed in similar cases.

The judgment of the trial court and the sentence of death are affirmed.

SHANNON, P.J., KEEFE and BLACK, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX A

EXTRACT FROM ENTRY OF JUNE 12, 1985, T.d. 64

COUNT ONE

The defendant having been found guilty by a jury on May 15, 1985, of Aggravated Murder as Charged, O.R.C. 2903.01, and with two specifications: the defendant, Dewaine Poindexter, as the principal offender, committed the offense of Aggravated Murder of Kevin Flanaghan while the defendant was committing Aggravated Burglary, as specified in section O.R.C. 2924.04(A)(7), and the defendant, Dewaine Poindexter, committed the offense of Aggravated Murder of Kevin Flanaghan as a part of a course of conduct involving the purposeful attempt to kill two or more persons, as specified in section O.R.C. 2929.04(A)(5); and the Jury at a sentencing proceeding on May 20, 1985, having recommended the DEATH penalty be imposed, and the Court having further found that the Aggravating Circumstances the defendant was found guilty of committing, do outweigh the mitigating factors, and so found by proof beyond a reasonable doubt;

And further, the defendant being before this Court accompanied by his Counsel, Dominic F. Perrino and Peter Pandilidis, and inquiry being made as to whether there is any reason sentence should not be pronounced, and no reason being stated, and further, Counsel and defendant being given an opportunity to speak before sentence is passed;

Therefore, as to Count One of the Indictment, the charge of

Aggravated Murder with Specifications of Aggravating Circumstances, it is the sentence of the Court to now order the Sheriff of Hamilton County, Ohio, to deliver the defendant to the custody of the Warden of the Ohio State Penitentiary within thirty days. The defendant shall remain in the Warden's custody until September 6, 1985, on which day he shall cause a current of electricity, of sufficient intensity to cause death, to pass through the defendant's body. The application of such current must be continued until the defendant is dead.

COUNT TWO

The defendant having been found guilty by a Jury on May 15, 1985, of Aggravated Murder as charged, O.R.C. 2903.01, and with two specifications: the defendant, Dewaine Poindexter, as the principal offender, committed the offense of Aggravated Murder of Kevin Flanaghan while the defendant was committing the offense of Aggravated Burglary, as specified in section O.R.C. 2924.04(A)(7); and the Jury at a sentencing proceeding on May 20, 1985, having recommended the DEATH penalty be imposed, and the Court having further found that the Aggravating Circumstances the defendant was found guilty of committing, do outweigh the mitigating factors, and so found by proof beyond a reasonable doubt;

And further, the defendant being before this Court accompanied by his Counsel, Dominic F. Perrino and Peter Pandilidis, and inquiry being made as to whether there is any

reason sentence should not be pronounced, and no reason being stated, and further, Counsel and defendant being given an opportunity to speak before sentence is passed;

Therefore, as to Count Two of the Indictment, the charge of Aggravated Murder with Specifications of Aggravating Circumstances, it is the sentence of the Court to now order the Sheriff of Hamilton County, Ohio, to deliver the defendant to the custody of the Warden of the Ohio State Penitentiary within thirty days. The defendant shall remain in the Warden's custody until September 6, 1985, on which day he shall cause a current of electricity, of sufficient intensity to cause death, to pass through the defendant's body. The application of such current must be continued until the defendant is dead.

OPINION OF THE TRIAL COURT

APPENDIX C

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

STATE OF OHIO	:	CASE NO. B850757
Plaintiff	:	
-vs-	:	O P I N I O N
DEWAINE POINDEXTER	:	Judge Norbert A. Nadel
Defendant	:	

BACKGROUND

This case originated with the filing of an indictment on March 1, 1985, against defendant, Dewaine Poindexter, charging him with Aggravated Murder in Counts One and Two of the indictment and charging him with one specification of Aggravating Circumstances as to each Count One and Count Two, thus qualifying this case as a possible death penalty case under the laws of the State of Ohio. In addition, defendant was charged with the following offenses:

In the Third Count of the indictment, defendant was charged with Aggravated Burglarly.

In the Fourth Count of the indictment, defendant was charged with Felonious Assault on Tracy Abernathy.

In the Fifth Count of the indictment, defendant was charged with Kidnapping Tracy Abernathy.

In the Sixth Count of the Indictment, defendant was charged with Attempted Aggravated Murder of John Hurt.

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This opinion deals only with the Aggravated Murder charges and the specifications pertaining to said murder. It is prepared and will be filed with the First District Court of Appeals and with the Supreme Court of Ohio in compliance with the requirements of O.R.C. §2929.03(F).

Since the date of the subsequent arraignment, the docket sheet reflects an extensive process of trial preparation. Numerous motions were filed before and during trial. They were heard and ruled upon during the course of the pretrial preparation, during the course of the guilt or innocence trial and the sentencing proceeding. All rulings on said mtions are reflected either on the docket sheet of the case, directly on the face of the motion or on the record.

GUILT OR INNOCENCE TRIAL

The guilt or innocence trial of defendant, Dewaine Poindexter, commenced on May 9, 1985, with the process of jury selection from a special venire of one hundred (100). On May 10, 1985, the jury was impaneled and sworn. The jury finally selected consisted of twelve regular members and three alternates. On the regular panel of the jury, there were eight women and four men. One of the alternates had to be used as one of the regular panel members became ill between the first trial and the sentencing proceeding. The Court elected to retain the remaining alternates until the regular panel was finally discharged in order to assure that no mistrial might have to be declared while the regular panel was deliberating on the sentencing recommendation if then a member of the regular panel should become ill or need to be excused because of some other personal reason.

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On May 13, 1985, the State commenced its case and produced evidence on the charge of Aggravated Murder as set forth in Counts One and Two of the indictment, evidence as to each of two specifications of Aggravating Circumstances as to the First and Second Count, and evidence on the other four Counts in the indictment. During the course of the guilt or innocence trial, the State of Ohio presented twelve (12) witnesses and the defense rested without calling a single witness.

There was absolutely no doubt that Dewaine Poindexter was the perpetrator of the murder of Kevin Flanaghan as well as the other offenses charged in the separate Counts of the indictment.

After receiving instructions of law from the Court which were applicable to the guilt or innocence issue in the first trial and upon due deliberation, the trial jury did, on May 15, 1985, find defendant guilty of Aggravated Murder as charged in the First and Second Counts of the indictment, and also found defendant guilty of the two specifications contained in the indictment as they pertain to the First and Second Counts. In addition, the jury found the defendant guilty of the other separate Counts of the indictment as charged.

The Aggravating Circumstances which defendant, Dewaine Poindexter, was found guilty of committing were:

(1) Defendant, Dewaine Poindexter, as the principal offender, committed the offense of Aggravated Murder of Kevin Flanaghan, while the defendant was committing the offense of Aggravated Burglary.

(2) Defendant, Dewaine Poindexter, committed the offense of the Aggravated Murder of Kevin Flanaghan as part of a course of conduct involving the purposeful killing of Kevin Flanaghan and the attempt to kill John Hurt, and the said Dewaine Poindexter was the principal

offender in the Aggravated Murder of Kevin Flanaghan and the said Dewaine Poindexter was the principal offender in the commission of the Attempted Aggravated Murder of John Hurt.

Before receiving and reading the jury's verdict in open court, the Court allowed the alternate jurors, who were sequestered separately, to fully examine the exhibits admitted into evidence. This was done in order to assure that the alternate jurors had seen and heard exactly the same evidence the regular jurors had before it in reaching their verdict, so that if an alternate juror had to be pressed into service in the sentencing proceeding, that alternate juror could join the deliberative process with exactly the same exposure to evidence as the regular jurors.

SENTENCING PROCEEDINGS

On May 20, 1985, the second state of this matter, hereinafter referred to as the Sentencing Proceedings commenced, pursuant to O.R.C. §2929.03(D).

It should be noted that all of the jurors were sequestered during their deliberations on guilt or innocence and their deliberations on the sentencing proceedings.

At the sentencing proceedings, the Court reversed the traditional trial procedure ordering defendant to proceed first. This reversal of procedure did not, in any way, alter the burden of proof placed upon the State, as the instructions of the Court indicated. The original trial jury, with the addition of the one alternate juror who replaced the juror who became ill, heard additional testimony and the arguments of respective counsel relative to the factors in favor of and in mitigation of the sentence of death.

After receiving the instructions of the Court as to the applicable law in the sentencing proceedings, and upon due deliberation, the trial jury, on May 20, 1985, returned its verdict and found, unanimously, that the State of Ohio proved by proof beyond a reasonable doubt, that the Aggravating Circumstances which defendant, Dewaine Poindexter was found guilty of committing, were sufficient to outweigh the mitigating factors in this case. The jury recommended in its verdict that the sentence of death be imposed as mandated by provisions of ORC. §2929.03(D)(2).

The Court then discharged all the jurors and continued the case until June 7, 1985, in order to personally review the numerous exhibits and testimony before imposing sentence.

IMPOSITION OF SENTENCE PROCEEDINGS

On June 7, 1985, the Court proceeded to impose sentence pursuant to O.R.D. §2929.03(D)(3). On that same date, the Court announced that its written opinion would be filed within fifteen (15) days as required by O.R.C. §2929.03(F).

This Court found by proof beyond a reasonable doubt, upon a review of the relevant evidence in both trials, the testimony, exhibits, arguments of respective counsel, that the Aggravating Circumstances which defendant, Dewaine Poindexter, was found guilty of committing did outweigh the mitigating factors in the case and, therefore, on June 7, 1985, this Court imposed the sentence of death upon defendant, Dewaine Poindexter, ordering said execution to take place on September 6, 1985.

OPINION

The provisions of O.R.C. §2929.03(F) now require this Court to state in a separate opinion the Court's specific findings as to the existence of any of the mitigating factors specifically enumerated in O.R.C. 2929.04(B) or the existence of any other mitigating factors, and also requires the Court to state reasons why the Aggravating Circumstances that the offender was found guilty of committing were sufficient to outweigh the mitigating factors, since that is what the Court has in fact found by imposing the death penalty. In other words, the Court must put in writing the justification for its sentence.

In meeting its responsibility under the statute, the Court will review all mitigating factors described in O.R.C. §2929.04(B) as well as any other mitigating factors raised by defendant and will indicate what conclusions were reached from the evidence as to each. Those possible mitigating factors specifically set forth in the statute are as follows:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to other requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death, and

(8) The nature and circumstances of the offense, the history, character and background of the offender.

The Court will first, however, review the Aggravating Circumstances which defendant has been found guilty of committing and will indicate why the jury's conclusions on these matters were correct.

AGGRAVATING CIRCUMSTANCES

The Aggravating Circumstances that the defendant, Dewaine Poindexter, was found guilty of committing are as follows:

(1) The defendant, Dewaine Poindexter, as the principal offender, committed the offense of Aggravated Murder of Kevin Flanaghan, while the defendant was committing the offense of Aggravated Burglary.

(2) Defendant, Dewaine Poindexter, committed the offense of the Aggravated Murder of Kevin Flanaghan, as part of a course of conduct involving the purposeful killing of Kevin Flanaghan and the attempt to kill John Hurt, and the said Dewaine Poindexter was the principal offender in the commission of the Attempted Aggravated Murder of John Hurt.

In deliberating upon its decision in this case as required by O.R.C. §2929(3)(D), the Court placed itself in the same position as if it were one of the members of the jury panel. The Court evaluated all of the relevant evidence raised at both trials, the testimony, other

evidence, and the arguments of respective counsel, all of which had been available to the jury in its deliberation at various stages of this case.

The principles of law which guided this Court are contained in the written jury instructions provided to the jury during the two trials and which are part of the transcript. The evidence and testimony were tested by the Court from the viewpoint of credibility and relevancy to the existence of Aggravating Circumstances along with their qualitative and quantitative measure.

In the guilt or innocence trial at which the defense did not call a single witness in the sentencing proceedings in which defendant called witnesses and made an unsworn statement, counsel in argument to the jury, there was never a doubt in any respect that defendant was the principal perpetrator of the offenses charged in the First and Second Count of the indictment. A complete review of the evidence pertaining to Count One and Count Two and the specifications of Aggravating Circumstances as to Counts One and Two and the other Counts reveals to this Court, beyond any doubt, that the murder of Kevin Flanaghan, as well as the offenses charged in the other Counts of the indictments, were committed by the defendant, Dewaine Poindexter and by he alone.

Additionally, the evidence showed that on the morning of February 19, 1985, Tracy Abernathy was living in an apartment with Kevin Flanaghan. On that date, Dewaine Poindexter, in possession of a .32 caliber gun, broke a rear window and entered Tracy Abernathy's apartment. Tracy Abernathy and Kevin Flanaghan, sleeping upstairs and

awaken by the noise of the broken window, began to come down the steps inside the apartment. As they ascended the steps, Poindexter turned his firearm toward the two of them and backed them upstairs into a bedroom. Shortly thereafter, Poindexter fired the gun and hit Mr. Flanaghan in the right side of the chest. He fell back on the bed and was dead within a couple of minutes.

Further, the evidence showed that John Hurt, a security guard at the apartment complex, arrived at the Abernathy apartment and walked into this situation. Poindexter turned the gun on Mr. Hurt, and with the gun in hand, took John Hurt, who was unarmed at the time, and Tracy Abernathy back again into the bedroom where Mr. Flanaghan was lying dead. With Mr. Hurt on his knees, two shots were fired at him, within a couple feet, by Poindexter. One came so close to the side of Mr. Hurt's head that he had a powder burn on the side of this head. The third time the trigger was pulled, it clicked, nothing happened. Poindexter than retreated from the bedroom.

It was, therefore, the Court's conclusion, upon a full and complete review of all the relevant evidence, that there was proof beyond a reasonable doubt that defendant, as the principal offender, committed the offense of the Aggravated Murder of Kevin Flanaghan while the defendant was committing the offense of Aggravated Burglary.

The Court also found upon a full and complete review of all of the relevant evidence that there was proof beyond a reasonable doubt that defendant committed the offense of the Aggravated Murder of Kevin Flanaghan and defendant was the principal offender in the Aggravated Murder of Kevin Flanaghan and defendant was the principal offender in the commission of the Attempted Aggravated Murder of John Hurt.

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MITIGATING FACTORS

The Court will now review all possible mitigating factors indicating whether or not they were present and if so what, if any, consideration the Court gave to them. Those listed in O.R.C. §2929.04(B) are as follows:

(1) "Whether the victim of the offense induced or facilitated it." The Court finds no evidence to suggest that Kevin Flanaghan in any respect induced or facilitated the offense. This factor was not present.

(2) "Whether it is unlikely that the offense would have been committed, but for the fact that offender was under duress, coercion, or strong provocation." Again, the Court finds absolutely no evidence of any nature that would suggest that the defendant was under duress, coercion or strong provocation. This factor was not present.

(3) "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Again, the Court finds no evidence to suggest that defendant suffered from a mental disease or defect.

(4) "The youth of the offender". The Court finds that defendant was, at the time of the offense, 23 years of age. There was no evidence to suggest that his age was a factor that should be taken into account in mitigation of the sentence of death.

(5) "The offender's lack of a significant history of prior criminal conviction and delinquent adjudications." The record in this case indicates two previous convictions for criminal offenses of

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violence as an adult wherein the victim in both offenses was Tracy Abernathy. Therefore, the Court would deem it inappropriate to give the defendant any consideration pursuant to mitigating factor number five.

(6) "If the offender was a participant in the offense but not the principal offender the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim." The Court finds in this case that defendant was the principal offender, therefore, this mitigating factor is not present.

The Court now reviews the remaining possible mitigating factors enumerated in O.R.C. §2929.04(B). These two remaining possible mitigating factors are closely interrelated and will be reviewed as interrelated.

(7) "Any other factors that are relevant to the issue of whether the offender should be sentenced to death." and,

(8) "The nature and circumstances of the offense, the history, character and background of the offender."

The nature and circumstances of this offense appear clear to the Court. Therefore, it will not be this Court's intention to reiterate in this opinion each and every detail of the murder of Kevin Flanaghan or the other offenses committed by defendant.

It is quite clear that on February 19, 1985, the victim Kevin Flanaghan, and Tracy Abernathy, were living together at the Fay Apartments, 1314 Nottingham Drive. They were living there with Tracy Abernathy's two young children. At the time that they were living together, Dewaine Poindexter was not living with Tracy Abernathy,

although he had lived with her before. The two children Tracy had were Dewaine Poindexter's two children. They had been broken up for approximately a year.

At about 10:30 the morning of February 19, 1985, defendant went to the apartment of Tracy Abernathy, went to the back window and broke in the glass window, and entered her apartment. When he entered that apartment, he had a .32-caliber - Smith & Wesson gun. In the apartment, Kevin Flanaghan and Tracy Abernathy were sleeping upstairs. They heard the noise and came downstairs to see what was going on. As they got partway down the steps, the defendant turned his firearm towards the two of them and backed them upstairs into a bedroom.

In the bedroom, Dewaine Poindexter aimed the gun straight towards Mr. Flanaghan and as Mr. Flanaghan backed away and sat on the bed, defendant pointed the gun at Kevin Flanaghan and clicked it one time. The gun did not fire at this point. Poindexter then fired the gun and hit Mr. Flanaghan in the right side of the chest. Kevin Flanaghan fell back on the bed, and was dead within a couple of minutes. Shortly thereafter, defendant forcibly took Tracy Abernathy at gunpoint out of that room, after she had hugged Mr. Flanaghan for the last time. One of the small children was in the house at the time.

The proven facts of Aggravating Circumstances reveal a cruel, willful and cold-blooded disregard for human life and values.

At the sentencing hearing, friends and relatives of the defendant testified and could offer no explanations for the violent acts committed by Dewaine Poindexter in this case. There was no testimony addressed during these proceedings that any childhood experiences of

defendant resulted in any emotional scarring of the defendant which could have later shown up and perhaps explain his behavior with reference to this case.

And, finally, the defendant in his unsworn statement to the jury said:

"...I have a love for my family and a love for my children very much.

Tracy's mother always refused to let me see my children.

While I was in jail, Tracy was hanging out in bars and my children were neglected.

She turned the children over to the welfare department and four days later went back and got them.

When we lived together, she was a good mother. When I wasn't there, she was not, and the children were neglected.

I am a religious person, and I believe in raising the proper family. I don't believe in violence. I don't use profanity, drugs or alcohol. I don't believe in it.

I have always been taught to respect others, and I have always respected others.

I believe in the Bible and I read it religiously.

I believe very highly in God and always try to live a good and decent life.

And the main thing, I didn't kill that man."

The evidence is overwhelmingly contrary to this last assertion by defendant.

CONCLUSION

The sole issue which confronted the Court is stated as follows:

> DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES WHICH THE DEFENDANT, DEWAINE POINDEXTER WAS FOUND GUILTY OF COMMITTING, OUTWEIGH THE FACTORS IN MITIGATION OF THE IMPOSITION OF THE SENTENCE OF DEATH?

In this regard, all of the statutory mitigating circumstances and all other possible mitigating factors raised by counsel have now been reviewed and discussed. The same has been done with the Aggravating Circumstances.

Upon full, careful and complete scrutiny of all the mitigating factors set forth in the statute or called to the Court's attention by defense counsel in any manner and after considering fully the Aggravating Circumstances which exist and have been proven beyond a reasonable doubt, the Court concludes that the Aggravating Circumstances do outweigh all the mitigating factors advanced by defendant, Dewaine Poindexter, beyond a reasonable doubt as required by O.R.C. §2929.03(D)(3).

For all the above stated reasons, the recommendation of the trial jury was adopted and the sentence of death was imposed upon the defendant, Dewaine Poindexter, on June 7, 1985.

DATE: June 10, 1985

Norbert A. Nadel

Norbert A. Nadel, Judge

APPENDIX D

ORDER DENYING REHEARING

The Supreme Court of Ohio
Columbus

1988 TERM

To wit: April 20, 1988

State of Ohio, Appellee, : Case No. 87-243

v. : REHEARING ENTRY

Dewaine Poindexter, Appellant. : (Hamilton County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 20th day of April, 1988.

MARCIA J. MENGEL CLERK

DEPUTY

APPENDIX E

STATUTES AND CONSTITUTIONAL PROVISIONS

§ 2901.04 Rules of construction.

(A) Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

§ 2903.01 Aggravated murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(D) No person shall be convicted of aggravated murder unless he is specifically found to have intended to cause the death of another. In no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense listed in division (B) of this section is to be conclusively inferred, because he engaged in a common design with others to commit the offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit, the offense. If a jury in an aggravated murder case is instructed that a person who commits or attempts to commit any offense listed in division (B) of this section may be inferred, because he engaged in a common design with others to commit the offense by force or violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed during the commission of, attempt to commit, or flight from the commission of or attempt to commit the offense, the jury also shall be instructed that the inference is nonconclusive, that the inference may be considered in determining intent, that it is to consider all evidence introduced by the prosecution to indicate the person's intent and by the person to indicate his lack of intent in determining whether the person specifically intended to cause the death of the person killed, and that the prosecution must prove the specific intent of the person to have caused the death by proof beyond a reasonable doubt.

§ 2903.02 Murder.

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2907.02 Rape.

(A) No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply:

(1) The offender purposely compels the other person to submit by force or threat of force.

(2) For the purpose of preventing resistance, the offender substantially impairs the other person's judgment or control by administering any drug or intoxicant to the other person, surreptitiously or by force, threat of force, or deception.

(3) The other person is less than thirteen years of age, whether or not the offender knows the age of such person.

(B) Whoever violates this section is guilty of rape, an aggravated felony of the first degree. If the offender under division (A)(3) of this section purposely compels the victim to submit by force or threat of force, whoever violates division (A)(3) of this section shall be imprisoned for life.

(C) A victim need not prove physical resistance to the offender in prosecutions under this section.

(D) Evidence of specific instances of the victim's sexual activity, opinion evidence of the victim's sexual activity, and reputation evidence of the victim's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, or the victim's past sexual activity with the offender, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

Evidence of specific instances of the defendant's sexual activity, opinion evidence of the defendant's sexual activity, and reputation evidence of the defendant's sexual activity shall not be admitted under this section unless it involves evidence of the origin of semen, pregnancy, or disease, the defendant's past sexual activity with the victim, or is admissible against the defendant under section 2945.59 of the Revised Code, and only to the extent that the court finds that the evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value.

(E) Prior to taking testimony or receiving evidence of any sexual activity of the victim or the defendant in a proceeding under this section, the court shall resolve the admissibility of the proposed evidence in a hearing in chambers, which shall be held at or before preliminary hearing and not less than three days before trial, or for good cause shown during the trial.

(F) Upon approval by the court, the victim may be represented by counsel in any hearing in chambers or other proceeding to resolve the admissibility of evidence. If the victim is indigent or otherwise unable to obtain the services of counsel, the court may, upon request, appoint counsel to represent the victim [illegible] cost to the victim.

§ 2927.01 Abuse of a corpse.

(A) No person, except as authorized by law, shall treat a human corpse in a way that he knows would outrage reasonable family sensibilities.

(B) No person, except as authorized by law, shall treat a human corpse in a way that would outrage reasonable community sensibilities.

(C) Whoever violates division (A) of this section is guilty of abuse of a corpse, a misdemeanor of the second degree. Whoever violates division (B) of this section is guilty of gross abuse of a corpse, a felony of the fourth degree.

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 [2929.02.3] of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

(2) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be death, life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, shall be determined pursuant to divisions (D) and (E) of this section, and shall be determined by one of the following:

(a) By the panel of three judges that tried the offender upon his waiver of the right to trial by jury;

(b) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or his counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

If the trial jury recommends that the offender be sentenced to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(b) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

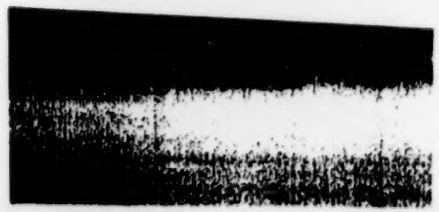
(E) If the offender raised the matter of age at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Life imprisonment with parole eligibility after serving twenty full years of imprisonment;

(2) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. The court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G) Whenever the court or a panel of three judges imposes sentence of death, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.



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§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

HISTORY: 134 v H 511 (Eff 1-1-74); 139 v S 1, Eff 10-19-81.

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§ 2929.05 [Appellate review of death sentence.]

(A) Whenever sentence of death is imposed pursuant to sections 2929.03 and 2929.04 of the Revised Code, the court of appeals and the supreme court shall upon appeal review the sentence of death at the same time that they review the other issues in the case. The court of appeals and the supreme court shall review the judgment in the case and the sentence of death imposed by the court or panel of three judges in the same manner that they review other criminal cases, except that they shall review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate. In determining whether the sentence of death is appropriate, the court of appeals and the supreme court shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases. They shall also review all of the facts and other evidence to determine if the evidence supports the finding of the aggravating circumstances the trial jury or the panel of three judges found the offender guilty of committing, and shall determine whether the sentencing court properly weighed the aggravating circumstances the offender was found guilty of committing and the mitigating factors. The court of appeals or the supreme court shall affirm a sentence of death only if the particular court is persuaded from the record that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors present in the case and that the sentence of death is the appropriate sentence in the case.

Any court of appeals that reviews a case in which the sentence of death is imposed shall file a separate opinion as to its findings in the case with the clerk of the supreme court. The opinion shall be filed within fifteen days after the court issues its opinion and shall contain whatever information is required by the clerk of the supreme court.

(B) The court of appeals and the supreme court shall give priority over all other cases to the review of judgments in which the sentence of death is imposed, and, except as otherwise provided in this section, shall conduct the review in accordance with the Appellate Rules.

(C) Whenever sentence of death is imposed pursuant to section 2929.022 [2929.02.2] or 2929.03 of the Revised Code, the court of common pleas that sentenced the offender shall, upon motion of the offender and after conducting a hearing on the motion, vacate the sentence if all of the following apply:

(1) The offender alleges in the motion and presents evidence at the hearing that he was not eighteen years of age or older at the time of the commision of the aggravated murder for which he was sentenced;

(2) The offender did not present evidence at trial pursuant to section 2929.023 [2929.02.3] of the Revised Code that he was not eighteen years of age or older at the time of the commission of the aggravated murder for which he was sentenced;

(3) The motion was filed at any time after the sentence was imposed in the case and prior to execution of the sentence;

(4) At the hearing conducted on the motion, the prosecution does not prove beyond a reasonable doubt that the offender was eighteen years of age or older at the time of the commision of the aggravated murder for which he was sentenced.

HISTORY: 139 v S 1, Eff 10-19-81.

§ 2929.06 [Resentencing hearing after vacation of death sentence.]

If the sentence of death that is imposed upon any offender is vacated upon appeal because the court of appeals or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

§ 2945.25 Causes of challenging of jurors.

A person called as a juror in a criminal case may be challenged for the following causes:

(C) In the trial of a capital offense, that he unequivocally states that under no circumstances will he follow the instructions of a trial judge and consider fairly the imposition of a sentence of death in a particular case. A prospective juror's conscientious or religious opposition to the death penalty in and of itself is not grounds for a challenge for cause. All parties shall be given wide latitude in voir dire questioning in this regard.

§ 2941.14 Allegations in homicide indictment.

(A) In an indictment for aggravated murder, murder, or voluntary or involuntary manslaughter, the manner in which, or the means by which the death was caused need not be set forth.

(B) Imposition of the death penalty for aggravated murder is precluded unless the indictment or count in the indictment charging the offense specifies one or more of the aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code. If more than one aggravating circumstance is specified to an indictment or count, each shall be in a separately numbered specification, and if an aggravating circumstance is specified to a count in an indictment containing more than one count, such specification shall be identified as to the count to which it applies.

(C) A specification to an indictment or count in an indictment charging aggravated murder shall be stated at the end of the body of the indictment or count, and may be in substantially the following form:

Specification (or, Specification 1, or Specification to the First Count, or, Specification 1 to the First Count). The Grand Jurors further find and specify that (set forth the applicable aggravating circumstance listed in divisions (A)(1) to (8) of section 2929.04 of the Revised Code. The aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same).

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§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B)(1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended May 7, 1968.)

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DEWAINE POINDEXTER	:	
Petitioner	:	No. 87-7311
vs.	:	
THE STATE OF OHIO	:	
Respondent	:	

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Arthur M. Ney, Jr.
Prosecuting Attorney

Christian J. Schaefer
Assistant Prosecuting Attorney
(Counsel of Record)

420 Hamilton County Courthouse
Court & Main Streets
Cincinnati, Ohio 45202

Attorneys for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. MUST AN APPELLATE COURT CONSIDER AN ERROR WHICH A PARTY COMPLAINING OF THE TRIAL COURT'S JUDGMENT COULD HAVE CALLED, BUT DID NOT CALL TO THE ATTENTION OF THE TRIAL COURT AT A TIME WHEN SUCH ERROR COULD HAVE BEEN CORRECTED OR AVOIDED?

II. DOES THE CONSTITUTION OF THE UNITED STATES REQUIRE REVIEWING COURTS TO BECOME IMGREGNABLE CITADELS OF TECHNICALITY MANDATING REVERSAL FOR EVERY CLOSING ARGUMENT OF A PROSECUTOR WHICH QUOTES THE CALMLY REASONED EXPLANATION OF THE LATE JUSTICE POTTER STEWART FOR THE DEATH PENALTY?

III. DOES A JURY INSTRUCTION WHICH ACCURATELY SETS OUT THE FUNCTION OF AN OHIO JURY IN THE PENALTY PHASE OF A CAPITAL CASE VIOLATE THE UNITED STATES CONSTITUTION?

IV. DOES THE CONSTITUTION OF THE UNITED STATES PROHIBIT THE SUPREME COURTS OF THE SEVERAL STATES FROM SUMMARILY DISPOSING OF ISSUES WHICH HAVE PREVIOUSLY BEEN RAISED, CONSIDERED, AND DECIDED BY THE STATE SUPREME COURT IN AN EARLIER CASE?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DEWAINE POINDEXTER :

Petitioner : No. 87-7311

vs. :

THE STATE OF OHIO :

Respondent :

On Writ of Certiorari to

The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF OHIO

OPINIONS BELOW

The decision of the Supreme Court of Ohio affirming petitioner's conviction and death sentence was released on March 23, 1988, and is reported at 36 Ohio St.3d 1, 520 N.E.2d 568, and is accurately set out as Petitioner's Appendix A. Petitioner's Appendix B accurately sets out the opinions of the Court of Appeals, First Appellate District, Hamilton County, Ohio. The Court of Common Pleas, Hamiton County, Ohio (the trial court), rendered an opinion as well. It is set out as "Appendix A" in this Memorandum.

JURISDICTION

Petitioner's claimed jurisdiction is accurately set out in his petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and Statutory provisions involved in this case are set out in "Appendix B" to this Memorandum.

STATEMENT OF THE FACTS

THE TRIAL

On February 11 or 12, 1985, petitioner and Lee Holmes were serving sentences in the Community Correctional Institution. (T.p. 467, 468) During a recreation period, petitioner told Mr. Holmes that Tracy Abernathy, who went to school with Mr. Holmes,

was not treating him well. (T.p. 4i70, 471, 472) Petitioner told Mr. Holmes that Tracy was going with some cher guy and that petitioner was going to kill him. (T.p. 474) Petitioner did not use the name of the man going with Tracy but referred to him as a "punk-assed nigger." (T.p. 473, 474)

On February 19, 1985, Tracy Abernathy was living at 2314 Nottingham in Hamilton County, Ohio. (T.p. 371, 416) She shared the two story townhouse with her two children and Kevin Flanagan. (T.p. 372) Tracy had lived with petitioner for two years prior to this time and petitioner was the father of Tracy's two children. (T.p. 367, 368) Tracy's separation from petitioner was an unpleasant experience. (T.p. 369) Prior to February 19, 1985, Tracy had no contact with petitioner for a period of six months. (T.p. 369, 370)

At 10:30 a.m. on that morning, Kevin and Tracy were awakened in their second floor bedroom by a crash from the kitchen on the first floor. (T.p. 372, 373) Kevin and Tracy started down the stairs to investigate and met petitioner three steps from the top. (T.p. 373) Petitioner had a gun and ordered Tracy and Kevin back to the bedroom. (T.p. 373, 374) Kevin Flanagan asked petitioner why he broke in. (T.p. 374) Petitioner responded by asking Kevin his name. (T.p. 374) After Kevin answered, petitioner pulled the trigger of his gun. It misfired. (T.p. 374) Petitioner aimed and pulled the trigger a second time. The gun fired and the bullet pierced Kevin's chest. (T.p. 374) Petitioner was no more than an arms length of Kevin when he fired the gun the second time. (T.p. 375) Kevin screamed and fell back on the bed. Tracy went to Kevin who said he loved her and died. (T.p. 375, 376)

Tracy got up and petitioner punched her in the eye and pulled her out of the room and down the stairs. Petitioner had Tracy get their one year old son and held them in the living room. There petitioner accused Tracy of prostituting. (T.p. 376)

In the meantime, Jacqueline Woods had observed a man trying to break into the rear of 2314 Nottingham. Later she saw the curtain and shade in disarray. Mrs. Woods called the Faye Apartment Security Force to check on the matter. (T.p. 460, 461,

465) Sergeant John Hurt of the Security Department went to the rear kitchen area of 2314 Nottingham and saw the broken window. (T.p. 404) After hearing screams from the inside, he knocked on the rear door of 2314 Nottingham. (T.p. 404, 377) Petitioner forced Tracy out the front door and put the gun in his pocket. (T.p. 377, 405) Sergeant Hurt, who did not carry any weapons while on duty, ran to the front of 2314 Nottingham. (T.p. 405, 407)

In front of the building, Sergeant Hurt approached Tracy who after a small commotion stated her boyfriend was shot on the second floor of 2314 Nottingham. (T.p. 406) Sergeant Hurt followed Tracy to the location of Kevin Flanagan's body. (T.p. 378, 399, 406) Petitioner was behind Sergeant Hurt and motioned him toward the door of 2314 Nottingham. (T.p. 406) Sergeant Hurt went into the apartment without seeing petitioner's gun. (T.p. 378, 406, 408)

At the top of the stairs, petitioner drew his gun and pushed Sergeant Hurt into the bedroom. (T.p. 406, 378, 379) Petitioner ordered Sgt. Hurt to his knees and Tracy ran to a closet. (T.p. 378, 379, 380, 406) Petitioner announced he was going to kill Tracy and Sergeant Hurt. (T.p. 415) Petitioner, at a range of eighteen inches, fired two shots at Mr. Hurt's head. (T.p. 380, 414, 406) Petitioner again pulled the trigger but the gun clicked. (T.p. 380) Sergeant Hurt received powder burns from these shots on the left temple area of his head. (T.p. 414) Petitioner left the bedroom and Sergeant Hurt pushed the bed with the body of Kevin Flanagan on it against the bedroom door. (T.p. 407) Using a two-way radio, Sergeant Hurt called the Cincinnati Police Division asking for help. (T.p. 407) Sergeant Hurt heard the petitioner reloading his gun outside the bedroom. (T.p. 416)

Petitioner forced his way into the bedroom. (T.p. 407) After pistol whipping Tracy, petitioner ordered Sergeant Hurt and Tracy out the front door. (T.p. 407, 408, 382, 381) Outside, petitioner dragged Tracy away from the apartment. (T.p. 382, 408, 424, 425) Tracy was carrying her baby and bleeding from her head. (T.p. 424, 425) A Cincinnati police cruiser appeared on the scene screeching to a halt and backing up. (T.p. 382, 425)

behind a building at 4015 President Drive. (T.p. 408, 426) Andrew Leonard observed these events and ran behind a neighboring building just in time to see petitioner throw the gun in a dumpster. (T.p. 426)

Police Officer Stephen Wong was the first to arrive on the scene and lost sight of petitioner who fled. (T.p. 484) Officer Wong saw Tracy bleeding and the body of Kevin Flanagan on the second floor of 2314 Nottingham. (T.p. 4868) Officer Wong was given petitioner's name by Tracy and a description by both Sergeant Hurt and Tracy. (T.p. 487, 488, 489) Tracy, Sergeant Hurt and Mr. Leonard positively identified petitioner as the perpetrator of these offenses. (T.p. 367, 368, 391, 392, 406, 413, 425, 430) Additionally, a shell casing found under the bed on which Kevin Flanagan died had one of petitioner's fingerprints on it. (T.p. 573, 574) The gun, Exhibit #6, was recovered by Officer Lubbe from the dumpster where Mr. Leonard saw petitioner throw it. (T.p. 509, 510, 511) William Schrand of the Coroner's Office testified that the buliet recovered from Kevin Flanagan's body was fired by Exhibit #6. (T.p. 599, 600)

Additional evidence showed that Tracy Abernathy was treated at a hospital for her injuries and received five stitches. (T.p. 389) An autopsy of Kevin Flanagan's body showed that he died from a single gunshot wound to the chest which severed a major artery leading from his heart. (T.p. 554) Other evidence showed that petitioner was arrested at his sister's home without resistance. (T.p. 518, 519, 520) Finally, Tracy testified that she did not voluntarily leave the apartment with petitioner and the kitchen window was not broken prior to 10:00 a.m. on February 19, 1983. (T.p. 382, 383)

After hearing all the evidence the jury returned a verdict finding petitioner guilty as charged.

THE SENTENCING HEARING

At the mitigating hearing four witnesses testified for petitioner. Petitioner's sister stated that petitioner was a nice person who never bothered anyone unless they did something to him first. (T.p. 727) John Davis, who knew petitioner for 19 years stated petitioner was not a trouble maker, read the bible a lot, and had a good reputation. (T.p. 732, 733) Petitioner's

grandmother also testified that petitioner was a peaceful peson and deserved mercy. (T.p. 736) Finally, petitioner's mother stated that petitioner was never in trouble until he started messing around with Tracy Abernathy. (T.p. 740)

Petitioner read an unsworn statement in which he stated that he spent 180 days in the workhouse for felonious assault and domestic violence for an incident that he described as:

> "When she came at me with a knife at her mother's house, I was just returning my son to her house. I took the knife from her, and she cut herself." (T.p. 753)

Petitioner stated he was released from the Workhouse on February 15, 1985, four days before the murder. (T.p. 753) Petitioner then stated he "didn't kill that man." (T.p. 754)

The jury considered all evidence presented and found the two aggravating circumstances to outweigh all mitigating circumstances beyond a reasonable doubt. The sentence of death was recommended.

The trial judge, in an opinion, dated June 10, 1985, analyzed all pertinent information and reached the same conclusion. The trial judge sentenced petitioner to death for killing Kevin Flanagan. The Ohio Court of Appeals and Ohio Supreme Court conducted an independent weighing of aggravating circumstances and mitigating factors and affirmed the sentence of the trial court.

REASONS FOR DENYING WRIT

I

AN APPELLATE COURT NEED NOT CONSIDER AN ERROR WHICH A PARTY COMPLAINING OF THE TRIAL COURT'S JUDGMENT COULD HAVE CALLED, BUT DID NOT CALL, TO THE TRIAL COURT'S ATTENTION AT A TIME WHEN SUCH ERROR COULD HAVE BEEN AVOIDED OR CORRECTED BY THE TRIAL COURT.

ARGUMENT

The petitioner's primary claim of error is one which was not raised in any fashion at trial. It is, under Ohio law, waived. The Ohio Supreme Court in State v. Williams, 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977) held in its syllabus paragraph 1 that:

> "1. An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of State v. Glaros, 170 Ohio St. 471, approved and followed.)"

This Court in Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1584 (1982) at 124, 1570 recognized the long established Ohio waiver rule.

The only exception to the Ohio Waiver rule is the plain error rule defined in State v. Underwood, 3 Ohio St.3d 12, 444 N.E.2d 1332 (1983) as follows:

> "The failure to object to a jury instruction constitutes a waiver of any claim of error relative thereto, unless, but for the error, the outcome of the trial clearly would have been otherwise. (State v. Long, 53 Ohio St.2d 91 [7 O.O.3d 178], approved and followed.)"

Under this standard, the claimed error must be judged.

At trial one issue involved as a possible mitigating factor under O.R.C. 2929.04(B)(5) is the offender's lack of a significant history of prior criminal convictions and delinquency adjudications. On this issue petitioner's witnesses testified that he was with Tracy Abernathy. (T.p. 726, 727, 728, 737, 740, 745, 753) At 753 petitioner himself stated he was never in trouble with "Juvenile Court or any other court except for involvement with Tracy Abernathy." (T.p. 753)

Tracy Abernathy testified about these instances. At page 369 of the record it was as follows:

> "Q. And when you left, or when he left, or whatever, what type of a split-up was that?
>
> Was it a pleasant one, was it an unpleasant one?
>
> A. An unpleasant one.
>
> Q. Were there any problems at that time?
>
> A. Yes, because he would not leave me alone until I told him that he was finished.
>
> A. Did that result in having to call the police or become involved in the criminal justice system?
>
> Q. Yes, it did.
>
> Q. Approximately how many times did that happen?
>
> A. About five." (T.p. 369)

With this background the prosecutor made the following argument referring to Tracy Abernathy as "her":

> "And No. 7: The lack of a substantial record. Well, maybe he didn't have a juvenile record, and again you were told part of his record. But look what is consisted of. He did time in the workhouse for hitting somebody, punishing somebody. He was involved in the first trial, you heard with her, five different times. Five times he came in contact with the juvenile justice system, each escalating a little bit until he reached the big time. He got the gun, and he killed somebody. So that, again, is not a mitigating factor." (T.p. 770, 771) (emphasis added)

The petitioner claims that the prosecutor's use of the term "Juvenile Justice System" instead of "Criminal Justice System"[1] was so hideous of an error that it requires reversal.

First, this is not, as petitioner alleges, a reference to matters outside the record. Tracy testified as to the 5 contacts with some "justice system." Further, all of the statements by petitioner's witneses about him never being in trouble carried a caveat that excluded his relationship with Tracy Abernathy. petitioner's statement about not being in trouble with Juvenile Court or any court excluded his contacts with Tracy Abernathy. The prosecutor, in the same paragraph stated that there was no juvenile record. Based upon this record, the prosecutor did not during this time refer to facts outside the record. If any error occurred it was a simple misstatement.

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[1] Actually the error was probably made by the court reporter in that no one raised the matter at trial and in the same paragraph the prosecutor admits there was no juvenile record. At this late date, it is impossible for any one to swear which term was used. It should be noted that locally few people ever refer to juvenile court proceeding as the juvenile justice system.

The next question is whether such a misstatement is plain error. Because sometimes misstatements do occur, the Court before and after the argument issued a cautionary instruction regarding the content of arguments and the definition of evidence is given. In the case at bar, such an instruction is given at four different times in the record. (T.p. 622, 671, 672, 775, 780, 781) Additionally, the attorneys also stated that argument of counsel are not evidence on three occasions. (T.p. 356, 364, 658) It is submitted that the reason for such instructions is that, presumably, the jurors follow them. Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132 (1979)

In the case at bar the prosecutor in the same breath admitted no juvenile conviction and referred to Tracy Abernathy's testimony about five contacts with the juvenile justice system. Any reasonable person in view of all the cautionary instructions would not, as defense counsel does here, rush to the conclusion that the assistant prosecutor is engaging in a sinister plot to bring facts, not in the record, before the jury. The "first trial of the proceedings, in the jargon used at the trial level was the guilt phase. (T.p. 7, 777) At that trial Tracy Abernathy testified as to five contacts with the Criminal Justice System. It is submitted that any juror, following the Court's instructions, would simply conclude that the prosecutor misspoke. No reasonable person would conclude that there were 5 additional contacts with the Juvenile System. It is submitted that under the Underwood test no plain error occurred.

Further, this Court has recognized that misstatement by prosecutor is not grounds for automatic reversal. In Darden v. Wainwright, 477 U.S. _____, 106 S.Ct. 2464 (1986) at 2472 this Court set out the following test:

> "The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)."

In Donnelly v. DeChristoforo, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), this Court stated:

> "The 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of counsel, are seldom carefully constructed **in toto** before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Donnelly v. DeChristoforo, supra at 646, 1873.

It is submitted that this is not a repeated misrepresentation of a dramatic exhibit. Instead, all that is involved is a single misstatement which is contradicted by the prosecutor hismelf four sentences earlier. As was billed in advance not to be evidence and the court repeated and correctly instructed the jury as to the effect of argument. This claimed error in the argument did not rise to the level of a violation of due process rights.

II

THE CONSTITUTION OF THE UNITED STATES DOES NOT REQUIRE REVIEWING COURTS TO BE IMPREGNABLE CITIDELS OF TECHNICALITY MANDATING REVERSAL FOR EVERY CLOSING ARGUMENT OF A PROSECUTOR WHICH QUOTES THE CALMLY REASONED EXPLANATION OF THE LATE JUSTICE POTTER STEWART FOR THE DEATH PENALTY.

ARGUMENT

This Court in United States v. Hasting, 461 U.S. 499, 103 S.Ct. 1974 (1983) at 509, 1980 stated:

> "Chapman reflected the concern, later noted by Chief Justice Roger Traynor of the Supreme Court of California, that when courts fashion rules whose violations mandate automatic reversals, they 'retrea[t] from their responsibility, becoming instead "impregnable citadels of technicality."'
>
> * * *
>
> Since Chapman, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional vilations."

As stated previously, no constitutional error occurs in a closing argument unless that argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, supra. Petitioner's second claim is one which the Ohio Supreme Court found to be harmless error.

The transcript reveals that the defense counsel in his argument invoked the Beatitudes and high religious authorities in asking for a lesser sentence. He cautioned the jurors, referring to MacBeth, that they wouldn't want to be trying to wash the spots off of their hands. Finally, he told them that their verdict was the equivalent of the jurors personally killing petitioner. (T.p. 761 through 763) In response to the high religious authoriity cited by defendant, the prosecutor read a quotation from Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909 (1976). Prior to the excerpt being read, the following occurred:

> "MR. PANDILIDIS: Your Honor, O[2] object to reading something out of context.
>
> THE COURT: Ladies and gentlemen, what counsel -- and we have instructed you in the other proceeding -- what counsel says now in closing argument is not the law. It is not the evidence. The evidence that you

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[2] Presumably this is an error by the court reporter. Most likely, Mr. Pandilidis said, "I object" rather than "O object."

> will consider is what you heard from the witness and, plus the exhibits. We do give them some latitude, to make reasonable inferences based on what the evidence is.
>
> With that in mind, we'll let Mr. Dinkelacker proceed." (T.p. 775)

Following the reading of the passage, no one objected. At no time was the claim made that passage was inflammatory.

The prosecutor's statement is set out in full in footnote six of the decision of the Ohio Supreme Court in petitioner's Appendix A, page 6a. Essentially in a calm rational manner the prosecutor's quotation explained that function capital punishment serves in an organized society.

The standard used by this Court in Darden v. Wainwright, supra, at 2472 is as follows:

> "Under this standard of review, we agree with the reasoning of every court to consider these comments that they did not deprive petitioner of a fair trial. The prosecutor's argument did not manipulate or misstate the evidence, nor did it implicate other specific rights of the accused such as the right to counsel or the right to remain silent. See Darden v. Wainwright, 513 F.Supp., at 958. Much of the objectionable content was invited by or was responsive to the opening summation of the defense. As we explained in United States v. Young, 470 U.S. ____, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole. Id., at ____, 105 S.Ct. at 1045. The trial court instructed the jurors several times that their decision was to be made on the basis of the evidence alone, and that the arguments of counsel were not evidence."

Here, the arguments were not an attempt to manipulate evidence and were in direct response to the petitioner's invocation of religious authority in the opening portion of the argument of his attorney. The trial court reminded the jury not to consider the quotation as either the law or the evidence.

Under the standard set out by this Court any error in the use of this Court any error in the use of this quotation was harmless error. Petitioner relies upon Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985) which dealt with the Gregg quotation in combination with quotations from an earlier Georgia case. Here, the quotation was billed in advance as NOT THE LAW. The prosecutor urged the jury to base their decision on the evidence. In his fourteen page argument, the focus of all but one page is

about whether the evidence supports any of the statutory mitigating factors. The page that does not . merely a brief response to the "Beatitutes" argument of defense counsel.

Taken as a whole, the quotation, if error at all, does not violate the standard set out in Darden v. Wainwright, supra. Any error, is harmless error. United States v. Hastings, supra.

III

A JURY INSTRUCTION WHICH ACCURATELY SCRIBES THE FUNCTION OF AN OHIO JURY IN THE SENTENCING PHASE OF A CAPITAL CASE DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

Initially this issue was not raised and therefore waived. State v. Williams, supra and Engle v. Isaac, supra.

Petitioner, in his brief, virtually concedes that the questioned jury instruction accurately reflects Ohio law. The Ohio Supreme Court in State v. Williams, 23 Ohio St.3d 16, 490 N.E.2d 906 (1986) cert. denied 107 S.Ct. 1385, veh. denied 107 S.Ct. 1966, explained the difference between Ohio law and Mississippi law as follows:

> "Under R.C. 2929.03(D)(2) and (3), the jury and the trial court each make an independent finding as to whether the aggravating circumstances outweigh the mitigating factors, thus justifying the death sentence. No Ohio court is bound by the jury's weighing of the mitigating circumstances, as opposed to the Mississippi scheme reviewed by the Caldwell court. In Mississippi the jury's verdict of death would not be overturned unless 'it "was against the overwhelming weight of the evidence," or if the evidence of statutory aggravating circumstances is so lacking that a "judge should have entered a judgment of acquittal notwithstanding the verdict,"' id., at 248, quoting Williams v. State (Miss. 1984), 445 So.2d 798, 811. We find that the jury instructions in the instant case were an accurate statement of the law and, therefore, were relevant to the valid state interest in educating the jury on the application law."

Thus, the jury instruction in the case at bar were an accurate statement of Ohio law.

Petitioner claims that this Court has never definitively decided whether such an instruction may be given. That is not accurate. In Darden v. Wainwright, 477 U.S. _____, 106 S.Ct. 2464 (1986), footnote 15 this Court stated:

> "But petitioner's reliance on Caldwell is even more fundamentally mistaken than these factual differences indicate. Caldwell is relevant only to certain types of comment -- those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should be the sentencing decision. In this case, none of the comments could have had the effect of misleading the jury into thinking that it had a reduced role in the sentencing process."

The instruction in the case at bar did not mislead the jury as to its role in the sentencing process.[3] Therefore, no constitutional error occurred.

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[3]Relevant portions of the jury instruction were as follows:

"You must understand, however, that a jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the Court follows certain additional procedures required by the laws of this State.

Therefore, even if you recommend the death penalty, the law requires the Court to decide whether or not the defendant will actually be sentenced to death or to life imprisonment.

* * *

In this event, you will determine which of the two possible life sentences you recommend to the Court. In this event, your recommendation to the Court shall be one of the following:

(1) That Dewaine Poindexter be sentenced to life imprisonment with parole eligibility after 20 full years of imprisonment; or (2) That Dewaine Poindexter be sentenced to life imprisonment with parole eligiblity after 30 full years of imprisonment.

You must understand that if you make one of these particular recommendations, it will be binding upon the Court, and the Court must impose the specific life sentence you recommend." (T.p. 787, 788)

IV

NEITHER THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION PROHIBIT STATE SUPREME COURTS FROM DISPOSING SUMMARILY OF ISSUES OF LAW WHICH WERE PREVIOUSLY CONSIDERED AND DECIDED THE STATE SUPREME COURT BY SIMPLY CITING THE CASE IN WHICH THE ISSUE WAS DECIDED.

ARGUMENT

In the Opinion of the Ohio Supreme Court in this caes, the Court explained:

> "Initially, it should be noted that although R.C. Chapter 2929 requires this court to review capital cases in as certain manner, that chapter does not mandate that this court address and discuss, in opinion form, each and every proposition of law raised by the parties. While we recognize that certain issues of law must be raised to preserve a party's right of appeal in federal court, we will not reconsider and discuss such issues at length in each case. We, therefore, hold that when issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case."

The Court then applied this policy to various issues raised by petitioner. For instance, the Ohio Supreme Court decided the petitioner's third issue (Proposition of Law) as follows:

> "Appellant argues in his third proposition of law that the use of the same felony twice, to elevate the offense to aggravated murder and again to elevate it to capital aggravated murder, fails to narrow the class of offenders eligible for the death penalty. This court has rejected this argument. State v. Jenkins (1984), 15 Ohio St.3d 164, 177-178, 15 OBR 311, 322-323, 473 N.E.2d 264, 279-280. See State v. Buell, supra, at 141-142, 22 OBR at 218, 489 N.E.2d at 810-811; State v. Barnes (19868), 25 Onio St.3d 203, 206-207, 25 OBR 266, 269, 495 N.E.2d 922, 924-925; State v. Steffen, supra, at 114, 31 OBR at 275-276, 509 N.E.2d at 388. For the reasons expressed in those decisions, we adhere to that position."[4]

It is submitted that citing a previous case in which a court considered the identical claim is a permissible manner under the constitution for a State Supreme Court to dispose of an issue consistent with the due process claim of the Fourteenth Amendment.

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[4]This issue was also resolved by this Court adversely to the petitioner in Lowenfeld v. Phelps, ____ U.S. ____, 108 S.Ct. 546 (1988).

Further, there is good reason for this policy. The Ohio defense bar led by the State Public Defender's office has filed innumerable issues in briefs most of which have little if anything to do with the particular facts of the case being considered. They have not winnowed out the what from the chaff. See Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). In one such case State v. Spisak, 36 Ohio St.3d 80 (1988) the State Public Defender filed a brief containing 64 issues (Propositions of Law) and a total length (including reply brief and attachments) of over 900 pages.

Rather than impose an arbitrary page limitation which petitioner would claim prevented him from raising some federal issue, the Court resolved each issue (Proposition of Law) by citing the appropriate prior state or federal case resolving the issue.

In the age of word processors and with the stated goal of many members of the defense bar to force this Court to prohibit capital punishment by abuse of process and procedures, some measure of judicial ecomony is necessary. This, of course, did not short circuit the independent factual review by the Ohio Supreme Court. In conducting this function, the Court carefully reviewed the possible statutory mitigating factors and evidence presented in support of those factors and the aggravating circumstances of the murder.

Finally, it is submitted that the style in which a State Supreme Court writes its decision (as opposed to the content of the decision) is a matter which is not controlled by the Federal Courts. In Leis v. Flynt, 99 S.Ct. 698 (1978), this Court held that the Constitution does mandate the manner in which states control admission to the practice of law. Likewise, no authority has been cited by petitioner creating federal rights to the style in which a state court decision is written. If this Court were disposed to dictate style of writing decisions, this would undoubtedly lead to this Court having to write an entire procedural code for all state supreme courts mandating lengths of briefs, arguments, time for filings, and perhaps, even the amount of time each State Supreme Court Justice must spend considering each issue raised. It is submitted that the United States

Constitution does not provide for this Court to write such a procedural code.

It is submitted that no federal rights were violated in this regard.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully,

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Appendix "A"

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties, or it was the offender's specific purpose to kill a peace officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

(B) If one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment or count in the indictment and proved beyond a reasonable doubt, and if the offender did not raise the matter of age pursuant to section 2929.023 [2929.02.3] of the Revised Code or if the offender, after raising the matter of age, was found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court, trial jury, or panel of three judges shall consider, and weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character, and background of the offender, and all of the following factors:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death.

(C) The defendant shall be given great latitude in the presentation of evidence of the factors listed in division (B) of this section and of any other factors in mitigation of the imposition of the sentence of death.

The existence of any of the mitigating factors listed in division (B) of this section does not preclude the imposition of a sentence of death on the offender, but shall be weighed pursuant to divisions (D)(2) and (3) of section 2929.03 of the Revised Code by the trial court, trial jury, or the panel of three judges against the aggravating circumstances the offender was found guilty of committing.

Appendix "B"

C850394

COURT OF COMMON PLEAS

HAMILTON COUNTY, OHIO

STATE OF OHIO	:	CASE NO. B850757
Plaintiff	:	
-vs-	:	OPINION
DEWAINE POINDEXTER	:	Judge Norbert A. Nadel
Defendant	:	

BACKGROUND

This case originated with the filing of an indictment on March 1, 1985, against defendant, Dewaine Poindexter, charging him with Aggravated Murder in Counts One and Two of the indictment and charging him with one specification of Aggravating Circumstances as to each Count One and Count Two, thus qualifying this case as a possible death penalty case under the laws of the State of Ohio. In addition, defendant was charged with the following offenses:

In the Third Count of the indictment, defendant was charged with Aggravated Burglarly.

In the Fourth Count of the indictment, defendant was charged with Felonious Assault on Tracy Abernathy.

In the Fifth Count of the indictment, defendant was charged with Kidnapping Tracy Abernathy.

In the Sixth Count of the Indictment, defendant was charged with Attempted Aggravated Murder of John Hurt.

This opinion deals only with the Aggravated Murder charges and the specifications pertaining to said murder. It is prepared and will be filed with the First District Court of Appeals and with the Supreme Court of Ohio in compliance with the requirements of O.R.C. §2929.03(F).

Since the date of the subsequent arraignment, the docket sheet reflects an extensive process of trial preparation. Numerous motions were filed before and during trial. They were heard and ruled upon during the course of the pretrial preparation, during the course of the guilt or innocence trial and the sentencing proceeding. All rulings on said mtions are reflected either on the docket sheet of the case, directly on the face of the motion or on the record.

GUILT OR INNOCENCE TRIAL

The guilt or innocence trial of defendant, Dewaine Poindexter, commenced on May 9, 1985, with the process of jury selection from a special venire of one hundred (100). On May 10, 1985, the jury was impaneled and sworn. The jury finally selected consisted of twelve regular members and three alternates. On the regular panel of the jury, there were eight women and four men. One of the alternates had to be used as one of the regular panel members became ill between the first trial and the sentencing proceeding. The Court elected to retain the remaining alternates until the regular panel was finally discharged in order to assure that no mistrial might have to be declared while the regular panel was deliberating on the sentencing recommendation if then a member of the regular panel should become ill or need to be excused because of some other personal reason.

On May 13, 1985, the State commenced its case and produced evidence on the charge of Aggravated Murder as set forth in Counts One and Two of the indictment, evidence as to each of two specifications of Aggravating Circumstances as to the First and Second Count, and evidence on the other four Counts in the indictment. During the course of the guilt or innocence trial, the State of Ohio presented twelve (12) witnesses and the defense rested without calling a single witness.

There was absolutely no doubt that Dewaine Poindexter was the perpetrator of the murder of Kevin Flanaghan as well as the other offenses charged in the separate Counts of the indictment.

After receiving instructions of law from the Court which were applicable to the guilt or innocence issue in the first trial and upon due deliberation, the trial jury did, on May 15, 1985, find defendant guilty of Aggravated Murder as charged in the First and Second Counts of the indictment, and also found defendant guilty of the two specifications contained in the indictment as they pertain to the First and Second Counts. In addition, the jury found the defendant guilty of the other separate Counts of the indictment as charged.

The Aggravating Circumstances which defendant, Dewaine Poindexter, was found guilty of committing were:

(1) Defendant, Dewaine Poindexter, as the principal offender, committed the offense of Aggravated Murder of Kevin Flanaghan, while the defendant was committing the offense of Aggravated Burglary.

(2) Defendant, Dewaine Poindexter, committed the offense of the Aggravated Murder of Kevin Flanaghan as part of a course of conduct involving the purposeful killing of Kevin Flanaghan and the attempt to kill John Hurt, and the said Dewaine Poindexter was the principal offender in the Aggravated Murder of Kevin Flanaghan and the said Dewaine Poindexter was the principal offender in the commission of the Attempted Aggravated Murder of John Hurt.

Before receiving and reading the jury's verdict in open court, the Court allowed the alternate jurors, who were sequestered separately, to fully examine the exhibits admitted into evidence. This was done in order to assure that the alternate jurors had seen and heard exactly the same evidence the regular jurors had before it in reaching their verdict, so that if an alternate juror had to be pressed into service in the sentencing proceeding, that alternate juror could join the deliberative process with exactly the same exposure to evidence as the regular jurors.

SENTENCING PROCEEDINGS

On May 20, 1985, the second state of this matter, hereinafter referred to as the Sentencing Proceedings commenced, pursuant to O.R.C. §2929.03(D).

It should be noted that all of the jurors were sequestered during their deliberations on guilt or innocence and their deliberations on the sentencing proceedings.

At the sentencing proceedings, the Court reversed the traditional trial procedure ordering defendant to proceed first. This reversal of procedure did not, in any way, alter the burden of proof placed upon the State, as the instructions of the Court indicated. The original trial jury, with the addition of the one alternate juror who replaced the juror who became ill, heard additional testimony and the arguments of respective counsel relative to the factors in favor of and in mitigation of the sentence of death.

After receiving the instructions of the Court as to the applicable law in the sentencing proceedings, and upon due deliberation, the trial jury, on May 20, 1985, returned its verdict and found, unanimously, that the State of Ohio proved by proof beyond a reasonable doubt, that the Aggravating Circumstances which defendant, Dewaine Poindexter was found guilty of committing, were sufficient to outweigh the mitigating factors in this case. The jury recommended in its verdict that the sentence of death be imposed as mandated by provisions of ORC. §2929.03(D)(2).

The Court then discharged all the jurors and continued the case until June 7, 1985, in order to personally review the numerous exhibits and testimony before imposing sentence.

IMPOSITION OF SENTENCE PROCEEDINGS

On June 7, 1985, the Court proceeded to impose sentence pursuant to O.R.D. §2929.03(D)(3). On that same date, the Court announced that its written opinion would be filed within fifteen (15) days as required by O.R.C. §2929.03(F).

This Court found by proof beyond a reasonable doubt, upon a review of the relevant evidence in both trials, the testimony, exhibits, arguments of respective counsel, that the Aggravating Circumstances which defendant, Dewaine Poindexter, was found guilty of committing did outweigh the mitigating factors in the case and, therefore, on June 7, 1985, this Court imposed the sentence of death upon defendant, Dewaine Poindexter, ordering said execution to take place on September 6, 1985.

OPINION

The provisions of O.R.C. §2929.03(F) now require this Court to state in a separate opinion the Court's specific findings as to the existence of any of the mitigating factors specifically enumerated in O.R.C. 2929.04(B) or the existence of any other mitigating factors, and also requires the Court to state reasons why the Aggravating Circumstances that the offender was found guilty of committing were sufficient to outweigh the mitigating factors, since that is what the Court has in fact found by imposing the death penalty. In other words, the Court must put in writing the justification for its sentence.

In meeting its responsibility under the statute, the Court will review all mitigating factors described in O.R.C. §2929.04(B) as well as any other mitigating factors raised by defendant and will indicate what conclusions were reached from the evidence as to each. Those possible mitigating factors specifically set forth in the statute are as follows:

(1) Whether the victim of the offense induced or facilitated it;

(2) Whether it is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation;

(3) Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to other requirements of the law;

(4) The youth of the offender;

(5) The offender's lack of a significant history of prior criminal convictions and delinquency adjudications;

(6) If the offender was a participant in the offense but not the principal offender, the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim;

(7) Any other factors that are relevant to the issue of whether the offender should be sentenced to death, and

(8) The nature and circumstances of the offense, the history, character and background of the offender.

The Court will first, however, review the Aggravating Circumstances which defendant has been found guilty of committing and will indicate why the jury's conclusions on these matters were correct.

AGGRAVATING CIRCUMSTANCES

The Aggravating Circumstances that the defendant, Dewaine Poindexter, was found guilty of committing are as follows:

(1) The defendant, Dewaine Poindexter, as the principal offender, committed the offense of Aggravated Murder of Kevin Flanaghan, while the defendant was committing the offense of Aggravated Burglary.

(2) Defendant, Dewaine Poindexter, committed the offense of the Aggravated Murder of Kevin Flanaghan, as part of a course of conduct involving the purposeful killing of Kevin Flanaghan and the attempt to kill John Hurt, and the said Dewaine Poindexter was the principal offender in the commission of the Attempted Aggravated Murder of John Hurt.

In deliberating upon its decision in this case as required by O.R.C. §2929(3)(D), the Court placed itself in the same position as if it were one of the members of the jury panel. The Court evaluated all of the relevant evidence raised at both trials, the testimony, other evidence, and the arguments of respective counsel, all of which had been available to the jury in its deliberation at various stages of this case.

The principles of law which guided this Court are contained in the written jury instructions provided to the jury during the two trials and which are part of the transcript. The evidence and testimony were tested by the Court from the viewpoint of credibility and relevancy to the existence of Aggravating Circumstances along with their qualitative and quantitative measure.

In the guilt or innocence trial at which the defense did not call a single witness in the sentencing proceedings in which defendant called witnesses and made an unsworn statement, counsel in argument to the jury, there was never a doubt in any respect that defendant was the principal perpetrator of the offenses charged in the First and Second Count of the indictment. A complete review of the evidence pertaining to Count One and Count Two and the specifications of Aggravating Circumstances as to Counts One and Two and the other Counts reveals to this Court, beyond any doubt, that the murder of Kevin Flanaghan, as well as the offenses charged in the other Counts of the indictments, were committed by the defendant, Dewaine Poindexter and by he alone.

Additionally, the evidence showed that on the morning of February 19, 1985, Tracy Abernathy was living in an apartment with Kevin Flanaghan. On that date, Dewaine Poindexter, in possession of a .32 caliber gun, broke a rear window and entered Tracy Abernathy's apartment. Tracy Abernathy and Kevin Flanaghan, sleeping upstairs and

awaken by the noise of the broken window, began to come down the steps inside the apartment. As they ascended the steps, Poindexter turned his firearm toward the two of them and backed them upstairs into a bedroom. Shortly thereafter, Poindexter fired the gun and hit Mr. Flanaghan in the right side of the chest. He fell back on the bed and was dead within a couple of minutes.

Further, the evidence showed that John Hurt, a security guard at the apartment complex, arrived at the Abernathy apartment and walked into this situation. Poindexter turned the gun on Mr. Hurt, and with the gun in hand, took John Hurt, who was unarmed at the time, and Tracy Abernathy back again into the bedroom where Mr. Flanaghan was lying dead. With Mr. Hurt on his knees, two shots were fired at him, within a couple feet, by Poindexter. One came so close to the side of Mr. Hurt's head that he had a powder burn on the side of this head. The third time the trigger was pulled, it clicked, nothing happened. Poindexter than retreated from the bedroom.

It was, therefore, the Court's conclusion, upon a full and complete review of all the relevant evidence, that there was proof beyond a reasonable doubt that defendant, as the principal offender, committed the offense of the Aggravated Murder of Kevin Flanaghan while the defendant was committing the offense of Aggravated Burglary.

The Court also found upon a full and complete review of all of the relevant evidence that there was proof beyond a reasonable doubt that defendant committed the offense of the Aggravated Murder of Kevin Flanaghan and defendant was the principal offender in the Aggravated Murder of Kevin Flanaghan and defendant was the principal offender in the commission of the Attempted Aggravated Murder of John Hurt.

MITIGATING FACTORS

The Court will now review all possible mitigating factors indicating whether or not they were present and if so what, if any, consideration the Court gave to them. Those listed in O.R.C. §2929.04(B) are as follows:

(1) "Whether the victim of the offense induced or facilitated it." The Court finds no evidence to suggest that Kevin Flanaghan in any respect induced or facilitated the offense. This factor was not present.

(2) "Whether it is unlikely that the offense would have been committed, but for the fact that offender was under duress, coercion, or strong provocation." Again, the Court finds absolutely no evidence of any nature that would suggest that the defendant was under duress, coercion or strong provocation. This factor was not present.

(3) "Whether, at the time of committing the offense, the offender, because of a mental disease or defect, lacked substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." Again, the Court finds no evidence to suggest that defendant suffered from a mental disease or defect.

(4) "The youth of the offender". The Court finds that defendant was, at the time of the offense, 23 years of age. There was no evidence to suggest that his age was a factor that should be taken into account in mitigation of the sentence of death.

(5) "The offender's lack of a significant history of prior criminal conviction and delinquent adjudications." The record in this case indicates two previous convictions for criminal offenses of

violence as an adult wherein the victim in both offenses was Tracy Abernathy. Therefore, the Court would deem it inappropriate to give the defendant any consideration pursuant to mitigating factor number five.

(6) "If the offender was a participant in the offense but not the principal offender the degree of the offender's participation in the offense and the degree of the offender's participation in the acts that led to the death of the victim." The Court finds in this case that defendant was the principal offender, therefore, this mitigating factor is not present.

The Court now reviews the remaining possible mitigating factors enumerated in O.R.C. §2929.04(B). These two remaining possible mitigating factors are closely interrelated and will be reviewed as interrelated.

(7) "Any other factors that are relevant to the issue of whether the offender should be sentenced to death." and,

(8) "The nature and circumstances of the offense, the history, character and background of the offender."

The nature and circumstances of this offense appear clear to the Court. Therefore, it will not be this Court's intention to reiterate in this opinion each and every detail of the murder of Kevin Flanaghan or the other offenses committed by defendant.

It is quite clear that on February 19, 1985, the victim Kevin Flanaghan, and Tracy Abernathy, were living together at the Fay Apartments, 1314 Nottingham Drive. They were living there with Tracy Abernathy's two young children. At the time that they were living together, Dewaine Poindexter was not living with Tracy Abernathy, although he had lived with her before. The two children Tracy had were Dewaine Poindexter's two children. They had been broken up for approximately a year.

At about 10:30 the morning of February 19, 1985, defendant went to the apartment of Tracy Abernathy, went to the back window and broke in the glass window, and entered her apartment. When he entered that apartment, he had a .32-caliber - Smith & Wesson gun. In the apartment, Kevin Flanaghan and Tracy Abernathy were sleeping upstairs. They heard the noise and came downstairs to see what was going on. As they got partway down the steps, the defendant turned his firearm towards the two of them and backed them upstairs into a bedroom.

In the bedroom, Dewaine Poindexter aimed the gun straight towards Mr. Flanaghan and as Mr. Flanaghan backed away and sat on the bed, defendant pointed the gun at Kevin Flanaghan and clicked it one time. The gun did not fire at this point. Poindexter then fired the gun and hit Mr. Flanaghan in the right side of the chest. Kevin Flanaghan fell back on the bed, and was dead within a couple of minutes. Shortly thereafter, defendant forcibly took Tracy Abernathy at gunpoint out of that room, after she had hugged Mr. Flanaghan for the last time. One of the small children was in the house at the time.

The proven facts of Aggravating Circumstances reveal a cruel, willful and cold-blooded disregard for human life and values.

At the sentencing hearing, friends and relatives of the defendant testified and could offer no explanations for the violent acts committed by Dewaine Poindexter in this case. There was no testimony addressed during these proceedings that any childhood experiences of

defendant resulted in any emotional scarring of the defendant which could have later shown up and perhaps explain his behavior with reference to this case.

And, finally, the defendant in his unsworn statement to the jury said:

"...I have a love for my family and a love for my children very much.

Tracy's mother always refused to let me see my children.

While I was in jail, Tracy was hanging out in bars and my children were neglected.

She turned the children over to the welfare department and four days later went back and got them.

When we lived together, she was a good mother. When I wasn't there, she was not, and the children were neglected.

I am a religious person, and I believe in raising the proper family. I don't believe in violence. I don't use profanity, drugs or alcohol. I don't believe in it.

I have always been taught to respect others, and I have always respected others.

I believe in the Bible and I read it religiously.

I believe very highly in God and always try to live a good and decent life.

And the main thing, I didn't kill that man."

The evidence is overwhelmingly contrary to this last assertion by defendant.

CONCLUSION

The sole issue which confronted the Court is stated as follows:

> DID THE STATE OF OHIO PROVE BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCES WHICH THE DEFENDANT, DEWAINE POINDEXTER WAS FOUND GUILTY OF COMMITTING, OUTWEIGH THE FACTORS IN MITIGATION OF THE IMPOSITION OF THE SENTENCE OF DEATH?

In this regard, all of the statutory mitigating circumstances a all other possible mitigating factors raised by counsel have now bee reviewed and discussed. The same has been done with the Aggravating Circumstances.

Upon full, careful and complete scrutiny of all the mitigating factors set forth in the statute or called to the Court's attention b defense counsel in any manner and after considering fully the Aggravating Circumstances which exist and have been proven beyond a reasonable doubt, the Court concludes that the Aggravating Circumstances do outweigh all the mitigating factors advanced by defendant, Dewaine Poindexter, beyond a reasonable doubt as required O.R.C. §2929.03(D)(3).

For all the above stated reasons, the recommendation of the tria jury was adopted and the sentence of death was imposed upon the defendant, Dewaine Poindexter, on June 7, 1985.

DATE: June 10, 1985

Norbert A. Nadel, Judge

SUPREME COURT OF THE UNITED STATES

DEWAINE POINDEXTER *v.* OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 87-7311. Decided October 17, 1988

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not take this view, I believe the Court should reserve judgment on this petition pending our disposition of *Dugger* v. *Adams* (No. 87-121), cert. granted —•— U. S. —— (1988). The petitioner here, like the petitioner in *Adams*, claims that a jury instruction stressing the preliminary nature of the jury's decision so minimized the jury's sense of responsibility for its decision and so increased the likelihood of a recommendation of death as to be unconstitutional under *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), despite the accuracy of the instruction. Notwithstanding the similarity of the petitioners' claims, the Court denies certiorari in the instant case without waiting to consider what light the *Adams* case will shed on the issues here. Because I consider such haste inappropriate, particularly when a man's life hangs in the balance, I dissent.